UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK
Case No. 10-13164 (CGM)
- x
In the Matter of:

FAIRFIELD SENTRY LIMITED, ET AL.,

Debtor in Foreign
Proceedings.
- x
Adv. Pro. No. 10-03496 (CGM)
- x
FAIRFIELD SENTRY LTD. (IN
LIQUIDATION), et al.,
Plaintiff,
v.
THEODOOR GGC AMSTERDAM ET AL,
Defendants.
- x
Adv. Pro. No. 10-03630 (CGM)
- x
FAIRFIELD SENTRY LTD. (IN
LIQUIDATION), et al.,
Plaintiff,

v.

HSBC SECURITIES SERVICES (LUXEMBOURG) SA et al.,

Defendants.

- x

Adv. Pro. No. 10-03635 (CGM)

- x

FAIRFIELD SENTRY LTD. (IN LIQUIDATION), et al.,

Plaintiff,

v.

UNION BANCAIRE PRIVEE, UBP SA et al.,

Defendants.

- x

Adv. Pro. No. 10-03636 (CGM)

- x

FAIRFIELD SENTRY LTD. (IN LIQUIDATION), et al.,

Plaintiff,

v.

UNION BANCAIRE PRIVEE, UBP SA et al.,

Defendants.

- x

United States Bankruptcy Court
300 Quarropas Street, Room 248
White Plains, NY 10601

August 18, 2021
10:00 AM

B E F O R E :
HON CECELIA G. MORRIS
U.S. BANKRUPTCY JUDGE

ECRO: UNKNOWN

10-03630-cgm Fairfield Sentry Limited (In Liquidation) et al v. HSBC Securities Services (Luxembourg) SA et al

Adversary proceeding: 10-03630-cgm Fairfield Sentry Limited (In Liquidation) et al v. HSBC Securities Services (Luxembourg) SA et al

Doc# 149 Motion to Dismiss Adversary Proceeding Notice of Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(5) filed by Michael C. Lambert on behalf of Private Space Ltd.. Responses due by 7/26/2021,

Doc# 155 Memorandum of Law in Opposition to Private-Space Ltd.'s Motion to Dismiss for Insufficient Service of Process

Doc# 162 Reply Memorandum of Law Reply Memorandum of Law of Defendant Private-Space Ltd. in Support of Renewed Motion Pursuant to Fed. R. Civ. P. 12(b)(5) filed by Michael C. Lambert on behalf of Private Space Ltd.

10-03635-cgm Fairfield Sentry Limited (In Liquidation) et al v. Union Bancaire Privee, UBP SA et al

Doc# 568 Motion to Dismiss Adversary Proceeding for Failure to Serve Process filed by David M. Morris on behalf of Verwaltungs-und Privat-Bank AG Aktiengesellschaft. Responses due by 7/26/2021,

Doc# 571 Motion to Dismiss Adversary Proceeding for Failure to Serve Process filed by David M. Morris on behalf of Verwaltungs-und Privat-Bank AG Aktiengesellschaft. Responses due by 7/26/2021,

Doc# 573 Motion to Dismiss Adversary Proceeding For Insufficient Service of Process filed by Gregory F. Hauser on behalf of LGT Bank in Liechtenstein AG.

Doc# 577 Motion to Dismiss Adversary Proceeding For Insufficient Service of Process filed by Gregory F. Hauser on behalf of LGT Bank in Liechtenstein AG

Doc# 578 Motion to Dismiss Adversary Proceeding For Insufficient Service of Process filed by Gregory F. Hauser on behalf of LGT Bank in Liechtenstein AG.

Doc# 579 Motion to Dismiss Adversary Proceeding For Insufficient Service of Process filed by Gregory F.

Hauser on behalf of Liechtensteinische LB Reinvest AMS, AG.

Doc# 587 Motion to Dismiss Adversary Proceeding filed by Nowell Bamberger on behalf of HSBC.

Doc# 596 Memorandum of Law in Opposition to Centrum Bank Aktiengesellschaft's Motion to Dismiss for Insufficient Service of Process

Doc# 597 Memorandum of Law in Opposition to LGT Bank AG's Motion to Dismiss for Insufficient Service of Process

Doc# 598 Memorandum of Law in Opposition to Liechtensteinische Landesbank Aktiengesellschaft's Motion to Dismiss for Insufficient Service of Process

Doc# 600 Memorandum of Law in Opposition to Verwaltungs-undPrivat-Bank Aktiengesellschaft's Motion to Dismiss for Insufficient Service of Process

Doc# 601 Memorandum of Law in Opposition to HSBC's Motion to Dismiss for Insufficient Service of Process

Doc# 609 Memorandum of Law (Reply Memorandum of Law by Defendant Verwaltungs-Und Privat-Bank Aktiengesellschaft in Support of its Motion Pursuant to Fed. R. Civ. P. 12(b)(5) to Dismiss for Failure to Serve Process) (related document(s)568) filed by David M. Morris on behalf of Verwaltungs- und Privat-Bank AG Aktiengesellschaft.

Doc# 610 Reply Memorandum of Law by Defendant Centrum Bank Aktiengesellschaft in Support of its Motion Pursuant to Fed. R. Civ.P. 12(b)(5) to Dismiss for Failure to Serve Process (related document(s)571) filed by David M. Morris on behalf of Centrum Bank AG (AMS).

Doc# 612 Reply to Motion (related document(s)579) filed by Gregory F. Hauser on behalf of Liechtensteinische Landesbank AG.

Doc# 613 Reply to Motion (related document(s)578) filed by Gregory F. Hauser on behalf of LGT Bank in Liechtenstein AG.

Doc# 614 Reply to Motion (related document(s)587) filed by Nowell Bamberger on behalf of HSBC.

Adversary proceeding: 10-03636-cgm Fairfield Sentry Limited (In Liquidation) et al v. Union Bancaire Privee, UBP SA et al

Doc# 637 Motion to Dismiss Adversary Proceeding For Insufficient Service of Process filed by Gregory F. Hauser on behalf of Liechtensteinische LB Reinvest AMS, Liechtensteinische Landesbank AG.

Doc# 631 Motion to Dismiss Adversary Proceeding for Failure to Serve Process filed by David M. Morris on behalf of Centrum Bank AG (AMS). Responses due by 7/26/2021,

Doc# 628 Motion to Dismiss Adversary Proceeding for Failure to Serve Process filed by David M. Morris on behalf of Verwaltungs-und Privat-Bank AG Aktiengesellschaft. Responses due by 7/26/2021

Doc# 627 Motion to Dismiss Case /Complaint for Insufficient Service of Process filed by Michael B. Weitman on behalf of Arden International Capital, Ltd.

Doc# 654 Memorandum of Law in Opposition to Arden International Capital Limited's Motion to Dismiss for Insufficient Service of Process

Doc# 655 Memorandum of Law in Opposition to Centrum Bank Aktiengesellschaft's Motion to Dismiss for Insufficient Service of Process

Doc# 656 Memorandum of Law in Opposition to LGT Bank AG's Motion to Dismiss for Insufficient Service of Process

Doc# 657 Memorandum of Law in Opposition to Liechtensteinische Landesbank Aktiengesellschaft's Motion to Dismiss for Insufficient Service of Process

Doc# 659 Memorandum of Law in Opposition to Verwaltungs-und Privat-Bank Aktiengesellschaft's Motion to Dismiss for Insufficient Service of Process

Doc# 668 Reply to Motion to Dismiss for Insufficient Service of Process filed by Michael B. Weitman on behalf of Arden International Capital, Ltd.

Doc# 668 Reply to Motion to Dismiss for Insufficient Service of Process filed by Michael B. Weitman on behalf of Arden International Capital, Ltd..

Doc# 669 Reply Memorandum of Law by Defendant Verwaltungs-Und Privat-Bank Aktiengesellschaft in Support of its Motion Pursuant to Fed. R. Civ. P. 12(b)(5) to Dismiss for Failure to Serve Process (related document(s)628) filed by David M. Morris on behalf of Verwaltungs- und Privat-Bank AG Aktiengesellschaft.

Doc# 670 Reply Memorandum of Law by Defendant Centrum Bank Aktiengesellschaft in Support of its Motion Pursuant to Fed. R. Civ.P. 12(b)(5) to Dismiss for Failure to Serve Process (related document(s)631) filed by David M. Morris on behalf of Centrum Bank AG (AMS).

Doc# 672 Reply to Motion (related document(s)637) filed by Gregory F. Hauser on behalf of Liechtensteinische Landesbank AG.

Doc# 673 Reply to Motion (related document(s)633) filed by Gregory F. Hauser on behalf of LGT Bank in Liechtenstein AG.

Adversary proceeding: 10-03496-cgm Fairfield Sentry Limited (In Liquidation) et al v. Theodoor GGC Amsterdam et al

Doc# 3747 Motion to Dismiss Adversary Proceeding Notice of Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(5) filed by Michael C. Lambert on behalf of Private-Space Ltd.. Responses due by 7/26/2021

Adversary proceeding: 10-03496-cgm Fairfield Sentry Limited (In Liquidation) et al v. Theodoor GGC Amsterdam et al

Doc# 3764 Motion to Dismiss Case /Complaint for Insufficient Service of Process filed by Michael B. Weitman on behalf of Arden International Capital Limited.

Doc# 3765 Motion to Dismiss Adversary Proceeding for Failure to Serve Process filed by David M. Morris on behalf of Verwaltungs-und Privat-Bank Aktiengesellschaft. Responses due by 7/26/2021,

Doc# 3768 Motion to Dismiss Adversary Proceeding for Failure to Serve Process filed by David M. Morris on behalf of Centrum Bank Aktiengesellschaft. Responses due by 7/26/2021,

Doc# 633 Motion to Dismiss Adversary Proceeding for Insufficient Service of Process filed by Gregory F.

Hauser on behalf of LGT Bank in Liechtenstein AG.

Doc# 3771 Motion to Dismiss Adversary Proceeding For Insufficient Service of Process filed by Gregory F. Hauser on behalf of LGT Bank in Liechtenstein AG.

Doc# 3774 Motion to Dismiss Adversary Proceeding For Insufficient Service of Process filed by Gregory F. Hauser on behalf of Liechtensteinische LB Reinvest AMS.

Doc# 3782 Motion to Dismiss Adversary Proceeding filed by Nowell Bamberger on behalf of HSBC.

Doc# 3798 Memorandum of Law in Opposition to Arden International Capital Limited's Motion to Dismiss for Insufficient Service of Process

Doc# 3799 Memorandum of Law in Opposition to Centrum Bank Aktiengesellschaft's Motion to Dismiss for Insufficient Service of Process

Doc# 3800 Memorandum of Law in Opposition to LGT Bank AG's Motion to Dismiss for Insufficient Service of Process

Doc# 3801 Memorandum of Law in Opposition to Liechtensteinische Landesbank Aktiengesellschaft's Motion to Dismiss for Insufficient Service of Process

Doc# 3802 Memorandum of Law in Opposition to Private-Space Ltd.'s Motion to Dismiss for Insufficient Service of Process

Doc# 3804 Memorandum of Law in Opposition to Verwaltungs-undPrivat-Bank Aktiengesellschaft's Motion to Dismiss for Insufficient Service of Process

Doc# 3805 Memorandum of Law in Opposition to HSBC's Motion to Dismiss for Insufficient Service of Process

Doc# 3815 Reply to Motion to Dismiss for Insufficient Service of Process filed by Michael B. Weitman on behalf of Arden International Capital Limited.

Doc# 3815 Reply to Motion to Dismiss for Insufficient Service of Process filed by Michael B. Weitman on behalf of Arden International Capital Limited

Doc# 3816 Reply Memorandum of Law Reply Memorandum of Law of Defendant Private-Space Ltd. in Support of

Renewed Motion to Dismiss Pursuant to Fed R. Civ. . 12(b)(5) filed by Michael C. Lambert on behalf of Private-Space Ltd.

Doc# 3818 Reply Memorandum of Law by Defendant Verwaltungs-Und Privat-Bank Aktiengesellschaft in Support of its Motion Pursuant to Fed. R. Civ. P. 12(b)(5) to Dismiss for Failure to Serve Process (related document(s)3765) filed by David M. Morris on behalf of Verwaltungs-und Privat-Bank Aktiengesellschaft.

Doc# 3819 Reply Memorandum of Law by Defendant Centrum Bank Aktiengesellschaft in Support of its Motion Pursuant to Fed. R. Civ. P. 12(b)(5) to Dismiss for Failure to Serve Process (related document(s)3768) filed by David M. Morris on behalf of Centrum Bank Aktiengesellschaft

Doc# 3822 Reply to Motion (related document(s)3774) filed by Gregory F. Hauser on behalf of Liechtensteinische LB ReinvestAMS, Liechtensteinsche Landesbank Aktiengesellschaft.

Doc# 3823 Reply to Motion (related document(s)3771)

filed by Gregory F. Hauser on behalf of LGT Bank in Liechtenstein AG.

Doc# 3824 Reply to Motion (Adv. Pro. No. 10-3635) (related document(s)3782) filed by Nowell Bamberger on behalf of HSBC.

10-13164-cgm Fairfield Sentry Limited and Nomura International plc

Doc# 970 AMENDED Notice of Adjournment of Hearing RE: Status conference; hearing held and adjourned to 8/18/2021 at 10:00AM at Videoconference (ZoomGov) (CGM).

Transcribed by: Sonya Ledanski Hyde

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P R O C E E D I N G S

THE COURT: Good morning. I hope everyone is healthy. This is the -- I'll read out all the adversaries: 10-03630, Fairfield Sentry Limited v. HSBC Security (Luxembourg); 10-03635, Fairfield Sentry Limited v. Union Bancaire Privee, UBP SA; 10-3636, Fairfield Sentry Limited v. Union Bancaire Privee, UBP SA; 10-13164, Fairfield -- oh, excuse me. That's the lead case. 10-03496, Fairfield Sentry v. Theodoor GGC Amsterdam; and then I have 10-13164, Fairfield Sentry and Nomura International plc. State your name and affiliation.

MR. MORRIS: Your Honor, it's David Morris. I represent VP Bank and Centrum, which is now owned by VP Bank in 3635 and 3636.

THE COURT: Thank you.

MR. MORRIS: They are both Lichtenstein banks.

THE COURT: Thank you.

MR. LAMBERT: Good morning, Your Honor. This is Michael Lambert, of the firm Gilmartin, Poster & Shafto, LLP. I represent Private-Space Limited which is a defendant in Adversary Proceeding 10-03630.

THE COURT: Very good.

MR. MUNNO: Good morning, Your Honor. William Munno, of Seward & Kissel. We represent Arden International Capital, Ltd.

THE COURT: In which case?

MR. MUNNO: 10-03636.

THE COURT: Okay.

MR. CIRILLO: Your Honor, this is Richard Cirillo. I represent National Bank of Kuwait, S.A.K. and NBK Banque Privee in 10-03635 and 36.

MR. BAMBERGER: Good morning, Your Honor. This is Nowell Bamberger. I represent the HSBC defendants in this. With respect to the motions that are on for this morning. there's a motion in 10-3635 and I just want to be clear, with respect to that motion, I'm representing HSBC Bank USA, and my law firm, Cleary Gottlieb Steen & Hamilton.

MR. HAUSER: Your Honor, this is Gregory Hauser. I represent LGT Bank in Liechtenstein and the Liechtensteinische Landesbank. Both of those are Liechtenstein banks. Both of those are defendants in both 3635 and 3636.

MR. MARTIN: Your Honor, Randall Martin from Shearman & Sterling. I represent Nomura plc. I thought I heard you that name out, although I didn't think they were a defendant in any pending action before you today.

THE COURT: I don’t know that I did. I just -- I went through -- I went through the stack that I had. So we'll just see.

MR. MARTIN: Thank you, Your Honor.

THE COURT: Representing Fairfield? Are they having trouble getting in? There you are.

MR. MOLTON: Your Honor, David Molton, of Brown Rudnick. David Elsberg, who I see on the Zoom call, will be handling this hearing. And I don't -- have not gotten an understanding as to why he hasn't been able to join. I know that his partner, Ms. Konanova, just joined and maybe she can help us.

THE COURT: Please.

MR. MOLTON: Ms. Konanova?

MS. KONANOVA: Your Honor, I understand that Mr. Elsberg is just having a bit of tech trouble. He was in earlier, and I think seems to have gotten disconnected. But he's trying to get back on right now.

THE COURT: Okay. Thank you. Because I honestly -- I had an earlier hearing and disconnected myself too. So, but I was able to get it right back.

MS. KONANOVA: Thank you.

MR. MOLTON: Your Honor, it seems to be par for the course for these times.

THE COURT: Right. Exactly. Oh, my goodness. I know. At least we're not wearing masks at each other. Any update on him getting back in?

MS. KONANOVA: Your Honor, if he's not able to access the Zoom, we'll ask him to call in through a cell

phone. So I believe he's doing that right now.

THE COURT: Okay.

MS. KONANOVA: Thank you.

THE COURT: He can come in. But basically this is a motion to dismiss under 12(b)(5) for insufficient service of process. Is that correct? Is that what we're dealing with today?

MS. KONANOVA: Yes.

THE COURT: I just want to make sure we're all on the same page.

MS. KONANOVA: Yes, Your Honor.

MR. BAMBERGER: Yes, we are.

MR. MOLTON: Yes, Your Honor.

THE COURT: I know the defendants should start arguing anyway. I just didn't see Mr. Elsberg, and I would like to have him here when the defendants start arguing.

MS. KONANOVA: I appreciate your patience, Your Honor. If he's dialing in by phone, I'm sure he'll be on momentarily.

THE COURT: Just -- and let's just do some clarification here. I have Mr. Lambert on behalf of Private-Space, Ltd. doing the argument there. I have David Morris on behalf of Verwaltungs-und Privat-Bank AG and Centrum Bank and I have Gregory Hauser for LGT Bank Liechtenstein and Liechtensteinische Landesbank

Aktiengesellschaft -- I don't know that one -- LB Reinvest, Nowell Bamberger for HSBC and David Whitman on behalf of Arden International Capital. Am I correct on who's making the arguments today for the defendants?

MR. MUNNO: Your Honor, William Munno is making the argument on behalf of Arden International Capital, Ltd.

THE COURT: Okay. Thank you. Very good. Is everyone else -- am I correct on everyone else making the arguments?

MR. MORRIS: Yes, Your Honor.

MR. BAMBERGER: Yes, Your Honor.

MR. MORRIS: If it's easier -- it's David Morris -- my client has changed its name to VP Bank, which is much easier to pronounce than the very, very long German name that it used to have.

THE COURT: Thank you. Thank you. I will -- I will note that. But I think we have to say -- even though I cannot pronounce it, I can spell it. And we will go from there. Mr. Elsberg, you are now on the phone?

MR. ELSBERG: Yes, Your Honor. I apologize. I've not been able to get my video on. But I am dialed in by my phone.

THE COURT: Okay. If would you please just state your name for the record.

MR. ELSBERG: David Elsberg, for the liquidators.

THE COURT: Very good. And who's taking the lead argument? I would prefer that you don't repeat yourself. But who's taking the lead argument for the defendants?

MR. MORRIS: It's David Morris. I think I'll start, and agree that most of the issues are common, but not 100 percent of them.

THE COURT: Okay, Mr. Morris. I know each has their own motion. But who are you representing? Oh, I see you.

MR. MORRIS: VP Bank and Centrum, in 636 and 635.

THE COURT: Okay. Very good. You may proceed.

MR. MORRIS: The --

THE COURT: 36 -- let's get the record straight. It's 3635 and 3636 --

MR. MORRIS: Correct, Your Honor.

THE COURT: -- instead of 63. Okay. Very good. Please go ahead.

MR. MORRIS: Apologies.

THE COURT: That's fine.

MR. MORRIS: This case is complicated enough without my flipping the digits. The liquidators have conceded that they have not accomplished service. The only service they attempted was by mail, international mail, which they acknowledge in their opposition papers is not effective service. So the only question is where do we go

from here. And we submit that having failed to serve, that's enough. The case should be dismissed because service has not been made in many, many years.

The liquidators also have not made a motion for alternative service. They do in a footnote ask that the Court grant alternative service by serving U.S. counsel. But they haven't moved for that relief. It's not appropriate to grant a motion made by footnote, especially not when there was discovery ordered on the plaintiff side, but no opportunity for discovery on the defendant side on jurisdiction because there was no motion for anything else.

The defendants have had -- the plaintiffs, sorry, the liquidator has had years in order to make a motion for alternative service. The Liechtenstein defendants objected to service in 2012. They filed a series of motions for dismissal based on the absence of service. They filed -- we filed an affidavit of a justice of the Liechtenstein constitutional court explaining that Liechtenstein did not accept mail service and did not accept service on U.S. counsel and explaining how service should be made under letters rogatory. That was back in 2012.

So we submit that it's enough that the Court shouldn't even consider at this point the liquidator's request for alternative service. They haven't made the motion, and it would be untimely. But if the Court is going

to consider that request, we argue that it should be denied.

The parties agree on the standard, I think, that the burden of proof is on the liquidators, that they need to establish reasonable efforts to effectuate service, that -- and they have to show that the circumstances are such that the Court's intervention is necessary to order an alternative. And the Court needs to consider the comity issues that are involved when imposing a different regime on other countries.

So on the first prong, the diligence, the liquidators have not made diligence efforts for service. Even in 2010 when they began this case, they mailed service to Liechtenstein. They claim that the basis for that was subscription agreements. But it turns out they didn't have subscription agreements in their possession from our clients or the other Liechtenstein defendants or most of the other moving defendants.

For VP Bank, they didn't get the -- a signed subscription agreement until we produced it to them in discovery this summer. So they couldn't have relied on a subscription agreement in 2010 as the basis of service because they didn't have it.

For Centrum, they received a service agreement sometime after 2010. They haven't told us exactly when. But their opposition papers make it clear that they didn't

have it when they -- when they sent their registered letter in 2010. So it was unreasonable for them to serve by mail in 2010.

They say that Citco must have executed a long-form service agreement on VP Bank's behalf. But that is pure speculation. They offered no record evidence for that must-have and it doesn't meet the standard of reasonable diligence. It didn't meet the standard of reasonable diligence in 2010. It certainly doesn't meet it now and didn't meet it over the course of time as they continued to not do anything to cure their failure to serve on which they were notified in 2012 by our objection to their service.

After Fairfield I, like eight years -- eight years after the case had begun, the Court ruled that these cases were not related to the subscription agreements. And so, at that time, the liquidators should certainly -- certainly knew that they could not rely on the subscription agreements. But they didn't serve them, and they didn't move for alternative service. Instead they litigated that issue with one of the -- with another defendant, which they lost. And in Fairfield III in 2020, the judge ruled that -- Judge Bernstein ruled that there was no doubt that service could not be made under the service -- under the subscription agreements.

So in 2010, the liquidators -- in -- sorry, after

Fairfield I, the liquidators could have served us or tried to serve us. And after Fairfield III, they certainly could have made a motion for alternative service or tried to serve us, and they didn't.

Apparently they didn't even investigate how to serve a Liechtenstein. They certainly haven't put in any evidence on that issue. And in the only evidence they did put in is a statement, an estimate from a process server that they got this summer in 2021. That process server doesn't allege that they have any experience in service on Liechtenstein and the liquidators' affirmation doesn't allege that they have any -- that is a cover note -- a cover affirmation to that process server estimate doesn't say that the process server has experience in Liechtenstein.

The process server said -- the cover affirmation says the process server has used Hague service but doesn't say that they have any Liechtenstein experience. And that's a 2021 activity. So there is no evidence in the record that the liquidators did anything at all to attempt to serve between 2010 and now or ask for alternative service.

The liquidators made a tactical or a financial decision not to affect proper service or to seek leave for alternative service. That's a choice they made for their own reasons and they should be held to it. The case should just be dismissed.

Comity plays an important role here, and it's not just a formality. There is a difference between the way other countries view service and the way the United States views service. In Liechtenstein, the government cares a lot about the way that its citizens are drawn into foreign courts. They care enough about this that their diplomatic mission issued a note verbale, an official diplomatic note in this case which we've submitted in the record. And we've presented an affidavit from the president of the Liechtenstein Constitutional Court about how seriously Liechtenstein takes service.

It is a crime to serve in Liechtenstein other than under Liechtenstein law. And the cases require that comity be considered and the liquidators have not even addressed that issue in their responding papers.

We would submit that at this point alternative service should not be granted. It's just too late. But -- and is unreasonable under comity. But if the -- it also is not needed here. the trustee served in Liechtenstein under letters rogatory. And we put in as an attachment to Dr. Hoch, he's the Liechtenstein supreme court justice -- Constitutional Court justice, as an attachment to his affidavit, it's exhibit C to docket 3767 --

THE COURT: And he made -- but he made a ruling on this then?

MR. MORRIS: No. He would not. The Liechtenstein system is they have -- those justices are part-time justices and the court is a larger -- is a larger court. It's a different system that our system. The trustee, Mr. Picard, served in Liechtenstein by letters rogatory. It took about two months. And so it was not difficult and far shorter than the unsworn, noncredible estimate that the liquidators have put in as to how long it would take to serve in Liechtenstein.

So the only record evidence, the only sworn record evidence is that it takes about two months. They've had over ten years and could have done it at any time. The stay which did not impact service, Judge Lifland's stay explicitly in paragraph four from 2011 says nothing in this order prevents plaintiffs from effecting or completing service in any redeemer action. So there is no reason just for the liquidators to wait.

I think the liquidators' primary argument is some combination of timing and cost. And we've talked -- I've addressed timing. On cost, first, their estimate is unsupported and conclusory and unreliable given that the person they've put in doesn't have any stated experience about Liechtenstein. But their actual costs are mostly for translation. And that is a self-inflicted wound. There was no reason they needed to write a 220-plus-paragraph

complaint in two actions with voluminous appendices against more than a hundred -- against 70 or so defendants. That is what creates the translation burden.

If they had issued -- if they had written a short, simple, plain statement of the claim, as the rules require, against us, then that translation burden would have been minimal. It would have -- and frankly easier to understand and easier for everyone to deal with.

But even if you include the translation costs, the -- it's not an unreasonable burden before dragging in non-Americans, thousands of miles across the ocean into a country they don’t know and which they do not do business. They have no offices, no employees, in a language they don’t speak or at least don’t speak well. Before the -- before the Court allows the liquidators to do that, they should be required to cut square corners, which they have not done here.

And finally, I just would add that serving U.S. counsel puts us a very difficult position because it is illegal under Liechtenstein law to serve process in Liechtenstein. And there's no reason to put counsel in that position when there were perfectly appropriate, not difficult ways for service.

I can address Fairfield III if the Court wants. The liquidator had argued that this case was decided by

Fairfield III. And let me just say a few words. Fairfield III is -- I mean, is certainly not directly applicable. We were not a litigant in the Fairfield III issue. And it also is not comparable. It's a -- Fairfield III was a Hague Convention case. Liechtenstein is not a Hague Convention country. It was a Swiss law case. Liechtenstein is obviously a different law.

And in Fairfield III, the liquidators had a signed subscription agreement. Presumably that's why they picked Fairfield III to be the first case they litigated. But they didn't have a signed subscription agreement for any of the Liechtenstein defendants when they served in 2010. And, as I've said before, they didn't have that at all for one of my clients until we produced it in discovery a few weeks ago. There were -- as far as I know -- I mean, it was not possible for the Court to consider the Liechtenstein comity issues and its diplomatic note and the testimony -- the affidavit of its respected jurist because --

THE COURT: Let me just interrupt you, Mr. Morris. I just want to be clear. You're saying that they didn't have the subscription agreement but then you produced it in discovery, which I ordered in May. Is that correct?

MR. MORRIS: Correct.

THE COURT: Isn't that what you just said?

MR. MORRIS: Yes.

THE COURT: Okay. So it did exist.

MR. MORRIS: For -- yes. It did exist. But they couldn't have relied on it in 2010 because they didn't have it and --

THE COURT: Because there wasn't discovery in 2010. Move along.

MR. MORRIS: Very well. But even after Fairfield I, the subscription agreement is irrelevant to service because this case does not arise under the subscription agreement. So by 2018, the subscription agreement was an irrelevancy to service as Fairfield III ruled when the liquidators litigated that issue rather than just following the instruction of Fairfield I which was the subscription agreement is not relevant here.

So that's -- that is the essence of our argument, in addition to what's in the papers. And I'm happy to answer questions that the Court may have.

THE COURT: I have none. I just asked you the one I had. Who was -- who would like to be next?

MR. MUNNO: Your Honor, William Munno of Seward & Kissell for Arden International Capital, Ltd., which is a BVI company that wound up in 1995 returning all of its assets to its investors. It was a fund of hedge funds.

So let me start to say that Arden International Capital, Ltd., or AIC, as I might call it, has never been

served. It never had an office in New York or elsewhere in the U.S. It never signed a subscription agreement agreeing to be served by mail. Plaintiffs now admit these facts. Nevertheless plaintiffs continue to allege that AIC is a U.S. corporation. It never was, and plaintiffs knew that. They did not comply with Rule 11(b)(3). Plaintiffs purported to serve by mail to a New York office building that was never AIC's address. Plaintiffs knew at least by 2017 that AIC was not a U.S. corporation. That was detailed in our motion to dismiss with evidence providing that it was a BVI corporation. Yet plaintiffs have alleged in subsequent complaints that AIC is a U.S. corporation, including the fifth amended complaint that they filed a week ago. In a new, because we produced it -- not only produced it. Let me say rather we attached it in our motion papers that there was no clause permitting service by mail in the 1993 subscription agreement, and they acknowledged that. They didn't have any subscription agreement and the one that we have shows that there cannot be service by mail. Now plaintiffs did nothing, nothing for four years since 2017 when they had evidence that we were not a U.S. corporation and could not be served by mail. And that was something the plaintiffs could have easily determined in 2011, ten years ago. But they failed to do that. There is no excuse for plaintiffs' gross neglect. They have not shown good cause

as they must for failing to service AIC. There are no exceptional circumstances here for that failure. And for that reason and the reasons we detail in our motion papers, the complaint should be dismissed.

THE COURT: Very good. Next?

MR. LAMBERT: Good morning, Your Honor. This is Michael Lambert. Again, I represent Private-Space, which is a defendant in Adversary Proceeding 10-03630. I will try my best not to repeat any of the arguments Mr. Morris made, many of which, most of which apply equally to my client, Private-Space.

As with Mr. Morris' clients, Private-Space had admittedly not been properly served. The liquidators simply do not contest the point. The record shows that the liquidators made exactly one attempt to serve Private-Space, and that was in July of 2012 when they purportedly mailed a summons and complaint to an address in Monaco. But Monaco, like Switzerland, is a signatory to The Hague Service Convention, and like Switzerland, lodged an objection to mail service.

That's all laid out in the opinion of Monegasque counsel that is attached -- that is part of Private-Space's moving papers on the pending motion. That opinion has not been challenged in any way by the liquidators. And for that reason and that reason alone, the case against Private-Space

should be dismissed. They simply have not been properly served.

I will now address, like Mr. Morris did, the issue of whether this Court should exercise its discretion and allow alternative service on Private-Space, notwithstanding the fact that the liquidators have not made a motion for expedited service except in a footnote in their opposition papers.

The test, as Mr. Morris stated in his argument, is that -- is whether the liquidators have made a reasonable and diligent effort to affect service on Private-Space such that they should now be allowed to have a do-over by allowing them to affect alternative service on Private-Space's counsel, which is my firm, or by some other Hague Convention-compliant method of service on Private-Space itself.

The emphatic answer to that question is that they have not made such a -- any reasonable or diligent effort. It is abundantly clear that that one 2012 effort was nothing more than a casual and cavalier approach to service and that they had no reasonable basis for even that one failed attempt at service.

There are several reasons for that conclusion. First, by July 2012, the liquidators were on notice that mail service to objecting Hague Convention countries was

prohibited. They were first put on notice or should have been on notice of that prohibition by Judge Lifland's 2009 decision in the related BLMIS litigation, the case of Picard v. Cohmad Securities, which is cited in our brief. That case laid out that the Swiss government's prohibition on service by mail under The Hague Convention.

In June of 2012, a group of Swiss defendants in these same consolidated Fairfield actions made another filing pointing out to Judge Lifland the prohibition of mail service in Switzerland, and supported that argument with an opinion of Swiss counsel.

Now both Judge Lifland's decision and the filings in June 2012 in these cases involve service in Switzerland. But a couple of minutes of online research would have shown that Monaco was in the exact same position as Switzerland when it come to mail service; that is, both Monaco and Switzerland are members -- are Hague -- are signatories to The Hague Service Convention -- excuse me -- and both lodged objections to service by mail.

Yet a couple of weeks later after that filing in this case, the liquidators chose a method of service that they knew or should have known was invalid. Now the liquidators' response, as I understand it, is that at the time they, in good faith, thought that they could rely on the consent to mail service provision in the fund

subscription agreements. But let's just take a closer look at that argument as it pertains to Private-Space. And when we do, this is what we find. We find no evidence that they ever checked at the time to see if they had a long-form subscription agreement from Private-Space.

And, Your Honor, you need to keep in mind that the consent to service provision appears only in their long-form subscription agreements, as opposed to just assuming or hoping that they had such an agreement. The evidence in fact strongly suggests that the liquidators either made -- excuse me -- made no such effort in 2012 or, if they did, they didn't find any such agreement.

And what is that evidence? It's set forth in the declaration that I submitted as part of Private-Space's reply papers on the motion. As part of the limited discovery on service issues that Your Honor allowed, Private-Space requested the liquidators to produce copies of any subscription agreement on which the liquidators claimed to have relied in serving Private-Space by mail back in 2012.

In response, the liquidators produced only two short-form subscription agreements. The short-form subscription agreement do not contain any service by mail provision. I asked them to confirm that they had made a diligent search for any such subscription agreement and they

confirmed by email that they had made a diligent search. Now they did include as part of their opposition papers two long-form subscription agreement signed by HSBC Securities Services (Luxembourg) which acted as Private-Space's custodian and subscribers with respect to Private-Space's investment in Fairfield.

But they only had those agreements because Private-Space produced them in discovery on July 1st of this year. And you can -- and the proof of that is the Bates numbers on the documents. It's clear they came from Private-Space's files. In addition, the opposition declaration that was submitted by the liquidator, Mr. Chris, which defensively discusses the alleged difficulties the liquidators have had in finding relevant documents. That declaration says nothing whatsoever about finding any documents relating to Private-Space.

The conclusion, Your Honor, I submit is inescapable, that in 2012, the liquidators not only made no effort to ascertain Private-Space's position vis-à-vis The Hague Convention and service by mail, but that they did not have the very documents on which they claim to have relied on in serving Private-Space by mail. Third --

THE COURT: I think I've already ruled on that, have I not? That's why we had discovery in May.

MR. LAMBERT: You already ruled on what?

THE COURT: The fact that they didn't have it and they had discovery. And I ruled that you could have -- since May, they could get discovery on the service issue.

MR. LAMBERT: That's correct.

THE COURT: And that's why it's been produced.

MR. LAMBERT: That's correct. But presumably the funds must have had subscription agreements in their files, whether it would have had discovery or not. I mean, these are their subscription agreement.

THE COURT: I hear you.

MR. LAMBERT: Yeah. Okay. Third, Your Honor, Private-Space was a beneficial owner in the Fairfield funds. Private-Space never signed any subscription agreement as a subscriber. And even the fund's long-from subscription agreements refer only to mail service on a subscriber. Even the long-form subscription agreements are silent about mail service on a beneficial owner.

Fourth, even if the liquidators had such a consent from Private-Space, that is a consent to mail service, the opinion of Monegasque counsel that we submitted as part of our motion also opines that under Monegasque law, private parties cannot contract around the prohibition of mail service in Monaco.

And fifth and finally, Private-Space raised the Monegasque prohibition on service by mail at its first

opportunity to do so. that was in January of 2017 when Private-Space made its initial motion to dismiss. One of the grounds that we cited in support of that motion was insufficient service of process. The liquidators' opposition to the 2017 motion was solely on the ground of a presumed consent to service by mail via long-form subscription agreement.

Now I've already discussed the dubiousness of that proposition. But as Mr. Morris pointed out, by August of 2018, when Judge Bernstein issued his Fairfield I decision, he took away that argument because the subscription agreements are not applicable to these cases.

So the liquidators have made no effort to cure that defective 2012 service since January of 2017 when Private-Space first raised the problem with the service or since August of 2018 when the Fairfield I decision came down, even though there was no impediment to their doing so in the form of any court order or stay, as Mr. Morris pointed out.

Now the liquidators try to justify their inaction by arguing it would be too expensive and take too long to affect proper Hague Convention service. But what does their unsworn evidence show? The quote, the unsworn quote from a process serving firm, which is attached to Mr. Molton's declaration in opposition to the motion, shows that the

combined service fee and alleged translation costs for translating the document, the complaint into French, which would be necessary in Monaco for Private-Space, comes to less than $5,000 in total and that service in Monaco will take an estimated two to four months.

I submit that that pales in significance compared to the millions of dollars they are seeking to recover from Private-Space and it's also likely to pale in significance compared to the cost to the litigators of litigating the service issue. So I submit that the time and cost factors are simply no excuse for their inaction.

For all of these reasons, the liquidators have fallen woefully short of any due diligence or reasonableness standard that would justify alternative service on Private-Space's counsel some nine years after their one early feeble and failed attempt at service.

Now under the two-pronged test for alternative service pursuant to Rule 4(f)(3) set forth by Judge Bernstein in his December 2020 Fairfield III ruling, that should be the end of it because the liquidators have not made a showing of a reasonable and diligent effort to affect service on Private-Space. They are not entitled to alternative service.

But as Mr. Morris did, let me just briefly touch on Fairfield III because Private-Space is in a fundamentally

different position in these cases than HSBC Suisse was as to which Judge Bernstein in Fairfield III authorized alternative service by mail on HSBC Suisse's counsel, the Cleary Gottlieb firm. HSBC Suisse was first served in 2010. At the same time, the record shows that the liquidators directly served process on the Cleary Gottlieb firm.

At the time, Cleary Gottlieb was already actively litigating on behalf of HSBC Suisse. In fact, it looks like in September of 2010, they had filed a motion to withdraw the reference. By contrast, at the time Private-Space was supposedly served in 2012, no direct service was made on any counsel for Private-Space, and for good reason. Private-Space did not have a counsel in the case in 2012. Nobody had filed a notice of appearance on behalf of Private-Space in 2012.

And it wasn't until January of 2017 when my firm filed a notice of appearance on behalf of Private-Space, and that was immediately followed by Private-Space's initial motion to dismiss which raised, among other things, insufficient service and lack of personal jurisdiction. The latter grounds, you know, as Your Honor knows, has not yet been decided and has been fully preserved.

It's legally irrelevant that Private-Space learned about the action from HSBC Securities Services (Luxembourg) in November 2010 and immediately retained counsel to protect

its interests by, among other things, monitoring these proceedings. The case law is absolutely clear that notice of a lawsuit is not substitute for proper service.

And the act of filing a motion to dismiss at the first opportunity to do so should not by itself, which is basically what the liquidators are here urging, open the door to alternative service on the very counsel that made the motion to dismiss. Such a concept, I submit, totally eviscerates the need for proper Rule 4 service. Yes, we didn't properly serve you nine years ago. But because you hired an attorney to protect your interests rather than risk a default judgment based on an improper service of process, we can cure the problem just by serving the very attorneys who made the improper service and lack of personal jurisdiction motion on your behalf.

That's a proposition I respectfully submit should be rejected by the Court under all of these actions, and plaintiffs' motion to dismiss should, I respectfully submit, be granted. Thank you, Your Honor.

THE COURT: Thank you. Next?

MR. HAUSER: Your Honor, this is Gregory Hauser. And again, I represent LGT Bank in Liechtenstein and the Liechtensteinische Landesbank. We'll just call those LGT and LLB if it's easier for Your Honor. It's easier for me too. They are both Liechtenstein entities, as are Mr.

Morris' clients. And we join with his arguments 100 percent. We also join with Mr. Lambert's arguments with the exception of those that are specific to The Hague Convention, since Liechtenstein is not a Hague Convention country.

I just want to mention some factual circumstances for each of my two clients. With regard to LLB, again, as everybody has pointed out, the liquidators' only argument for having made reasonable efforts or having exercised due diligence is reliance on these supposed subscription agreements. They do not however submit any evidence that they had those subscription agreements in hand when they made the service or that, at the time they made the service, that they were relying on any particular agreement for any particular defendant.

Indeed for LLB, the only agreement they've been able to produce is one short-form subscription agreement between LLB and Fairfield Sentry. There isn't a single long-form agreement for LLB with any of the Fairfield and there's not even any short-form agreement between LLB and either Fairfield Sigma or Fairfield Lambda. So there's one short-form subscription agreement with no service by mail provision with only one of the plaintiffs. That simply isn't enough to rely on for reasonable efforts or due diligence.

With regard to LGT, there is one long-form agreement for Fairfield Sigma. There is none for Fairfield Sentry. There is none for Fairfield Lambda, and there is no evidence from the liquidators that they had that agreement in hand when they made service or that they relied on that one long-form agreement when they made service.

The argument for reasonable efforts fails because they lack evidence of the reliance that they've been claiming. And unless Your Honor has any questions specific to LLB or LGT, we simply join with the other counsel and ask that our motion to dismiss for insufficient service be granted.

THE COURT: Very good. Thank you.

MR. BAMBERGER: Your Honor, to conclude, Nowell Bamberger. I represent the HSBC defendants. I appreciate Your Honor's patience, and we'll try to be very brief.

We have a slightly different issue, as you may be aware, than some of the other defendants. And that is that we don’t actually know who the liquidators are trying to serve. I wish I wasn't before Your Honor on this issue.

My firm litigated on behalf of certain of our other clients the Fairfield III decision. The Court there authorized service on us. We don’t think that's correct. But following that decision, most of my clients stipulated to service as hundreds -- a hundred or so other defendants

have done. My understanding is those stipulations are submitted and before Your Honor to be signed off on.

In two cases, 3535 and 3536, the liquidators named an entity described only as HSBC. And we raised with them repeatedly that we didn't know who that was. And it became clear through our discussions with them that they didn't know either.

And when we pressed the issue, they -- after telling us for months that they were relying on the fund's documents as indicating that that was a correct defendant, they realized they actually had no documents in one of the cases suggesting any transfers had been made to our client.

THE COURT: Be careful with your rules of professional responsibility is all I can say.

MR. BAMBERGER: I understand, Your Honor, and that's why I was pretty clear, I think, about who I'm representing. And let me explain why I'm here speaking to Your Honor.

THE COURT: You keep calling it your client. And --

MR. BAMBERGER: I --

THE COURT: You don’t -- you don’t have anybody to talk to.

MR. BAMBERGER: I --

THE COURT: You do not have authorization. And

unless you can show that to me, you cannot speak on behalf of them.

MR. BAMBERGER: I apologize for the misstatement, Your Honor. And what I was trying to say is the liquidators indicated that there was an HSBC entity that had received transfers. And in one of the cases, when we pressed them on that, it became clear that they had no such records, and they dismissed that case.

In the other case, they provided us with some records. Those records have not resolved what entity they are trying to sue. And the reason I'm before Your Honor is we are left with a case where there is an entity named HSBC.

We have every reason, and the liquidators have every -- have given us every reason to believe that they are trying to sue an entity that is affiliated with clients who I represent. They have acknowledged, the liquidators have acknowledged that they have not affected service in any sufficient way on that entity. They are --

THE COURT: And that's for them to deal with on that entity. You cannot speak for an entity that you don’t think exists.

MR. BAMBERGER: I agree, Your Honor.

THE COURT: You can't.

MR. BAMBERGER: I agree, Your Honor. And that's precisely the problem because the liquidators have now come

to Your Honor and asked you to authorized service on me. and that is the problem.

THE COURT: Oh, okay.

MR. BAMBERGER: Right.

THE COURT: That's a different -- that's a different issue. Okay.

MR. BAMBERGER: Right. That's why I said I was representing my law firm, Your Honor because that -- having acknowledged that service wasn't effectuated, we cannot stand in and be served for an entity we don’t represent and who -- we don’t even know who it is. And that's the issue that we're before Your Honor on. It's the most basic type of notice issue. You know, the purpose of service is fundamentally so the defendant knows that they've been sued and can appear in court. And that's what we're missing here.

And if you look at what the liquidators are asking you to authorize in their brief, they don’t -- they don’t actually make a square ask. They ask you to authorize service on me under Rule 4(f)(3). They authorize, in the alternative, service under The Hague Convention or maybe under letters rogatory or, if the proper party is domestic, under the Federal Rules of Civil Procedure. They have to figure out who they're suing first. And then they have to serve that entity. And if they identify to us an entity --

THE COURT: I'll just stop you right there.

MR. BAMBERGER: Okay.

THE COURT: I can tell Mr. Elsberg and anyone else that if it can't be served on counsel, since there is no counsel, then they're in default. You've got to figure out your service issue with that entity. And I'm not dismissing it, Mr. Bamberger. I'm simply saying you can't depend on that service, Mr. Elsberg.

You've got to figure that out. That's a civil procedure issue, and you've got to figure that out. But someone can't argue about dismissal when they're not representing that client. And that puts them in an ethical situation, and you cannot do that, and you cannot serve the law firm on that entity, for that entity. I'll just clear on that.

MR. ELSBERG: Judge -- very clear, Your Honor. Thank you.

MR. BAMBERGER: And, Your Honor, the only other thing I'd add is I think the Federal Rules 4(m) suggest when service hasn't been effected, the proper remedy is that the Court must dismiss.

THE COURT: You cannot argue for a client that you don’t have.

MR. BAMBERGER: I am, as a friend of the Court, pointing out the rule, Your Honor --

THE COURT: That is a nice thing for you to do.

MR. BAMBERGER: -- and I'll stop talking. I will stop talking right now.

THE COURT: Okay.

MR. BAMBERGER: Thank you, Your Honor, for hearing me.

THE COURT: Thank you. And yes, Mr. -- okay, Mr. -- who have I not heard from? Mr. Hauser, I've heard from you. Okay. Anyone else wish to be heard before I turn to Mr. Elsberg? Mr. Elsberg? You're on mute.

MR. ELSBERG: Thank you, Your Honor. I'd like to start, if it would be helpful to Your Honor, just to do a very quick recap of how we got here procedurally or I can just jump right into the arguments, which ever you prefer.

THE COURT: I think you should give me quick recap. Let's make the record robust.

MR. ELSBERG: Yes. Thank you, Your Honor. So Your Honor, in 2016 and 2017, the parties briefed motions to dismiss on threshold issues, and those issues included service. Fairfield I, which is docket 1723, and Fairfield II, which is docket 1743, resolved some of those threshold issues but did not resolve service challenges.

The April '19 settled orders that implemented Fairfield I and II specified that service was to be decided in the future by motions to dismiss that would be filed by

the defendants. That's docket 1957, at page 10.

In March 25th, in a letter to Judge Bernstein, the defendants wrote that Judge Bernstein could resolve the service issues in a limited number of test cases that would resolve claims against the significant number of defendants. That's docket --

THE COURT: I'm aware of that one. Yes.

MR. ELSBERG: Yes.

THE COURT: And yet we're here today, so just keep arguing.

MR. ELSBERG: Okay. At a March 27, 2020 conference, Judge Bernstein instructed the parties to identify a representative complaint to resolve the service issue. That's at docket 3028. The parties conferred and agreed that HSBC Private Bank Suisse SA, which I refer to as HSBC Suisse, would be the representative defendant for the service issue. That's docket 3016.

On December 14, 2020, Judge Bernstein ruled on the service issue in Fairfield III using HSBC Suisse as the test case or representative action. That's docket 3062. And Judge Bernstein acknowledged that the liquidators were not arguing that they complied with The Hague Service Convention that held that alternative service on a foreign defendant's U.S. counsel is permissible under FRCP 4(f)(3) and does not run afoul of international agreements.

More specifically, Judge Bernstein held that service on U.S. counsel was permissible if there was adequate communication between counsel and the party to be served and held that HSBC Suisse had undoubtedly been in regular contact with the U.S. counsel and has actively participated in the underlying action since at least September 2010.

So after Fairfield III, the parties negotiated the settled orders. The defendants took the position that the service ruling applied only to HSBC Suisse, even though it was intended to be a representative defendant. And the defendants also maintained that all of the other defendants, aside from HSBC Suisse, were entitled to brief their own service challenges in the forthcoming motions to dismiss.

So then in February 22, 2021, Judge Bernstein entered an order. That's docket 3076. And in that order, Judge Bernstein wrote that certain determinations would bind all Swiss defendants, specifically the Court's authority to authorize service on U.S. counsel.

Judge Bernstein also wrote that the propriety of service on other defendants depends on whether they, like the HSBC Suisse, were in "regular contact" with U.S. counsel who "has actively participated in the particular adversary proceedings after it was commenced." That's docket 3076, at two and I'll refer to this as the contact test.

Judge Bernstein also wrote that he assumed that the conclusions regarding diligence and prejudice for other defendants are the same as they were with the HSBC Suisse. That's docket 3076, at two.

Nonetheless at the February 22, 2021, after that order, all of the defendants, except for about ten, refused to stipulate to be bound by the service ruling. at the April 21, 2021 conference, Your Honor then ordered that all defendants stipulate to be bound by Fairfield III's service ruling or file individualized briefs and respond to discovery on service issues. That's docket 3809-1, at 62 to 63.

And at that point, the defendants changed course. The service stipulation lists over 100 defendants. So the vast majority decided to stipulate. About 18 neither stipulated nor filed a motion. And my understanding, Your Honor, is that those defendants are deemed to have been served properly pursuant to Your Honor's statement at the April 21st conference at pages 63 to 64 of the transcript which is docket 3809-1.

So that brings us to the motions that we're now looking at. Only nine defendants ended up filing service motions. Of the nine that were filed, two are no longer at issue. The liquidators voluntarily released claims against Allianz Bank. That's docket 3795, and Unifortune

Conservative Side Pocket withdrew its motion on the record at the July 28, 2021 conference and in a subsequent notice of withdrawal which is the July 28, '21 transcript at 100 and is also reflected in a notice at docket 3827.

So what that leaves us with, Your Honor, is seven motions filed by seven defendants for Your Honor to resolve. And those are the ones we're addressing today.

THE COURT: Okay. Go on.

MR. ELSBERG: Private-Space, Arden International, a motion put in by Clearly that says they don’t represent HSBC, but they've put in a motion, and in addition to those three, there are four that are similar. They are all about Liechtenstein entities.

That's LGT Bank in Liechtenstein AG, which I'll refer to as LGT, Liechtensteinische Landesbank, which I'll refer to as LLB, Verwaltungs-und Privat-Bank, which I'll refer to as VP Bank, Centrum Bank AG, which I'll refer to as Centrum.

So, Your Honor, that's the context that I wanted to --

THE COURT: Okay. Let me just be clear on something.

MR. ELSBERG: Yes.

THE COURT: So you're saying to me that the attorneys here today are not representing certain of these -

- I understand about Cleary Gottlieb and HSBC. But Centrum Bank and the Liechtenstein, did I mishear you on this?

MR. ELSBERG: Your Honor, I did not mean to say that those lawyers are saying they have no clients. The only one is Cleary with respect to HSBC.

THE COURT: Okay. That's fine. I just wanted to -- I wanted to make sure that I heard what you said properly. Okay.

MR. ELSBERG: Okay. So with that background, Your Honor, I will jump into the -- jump into the arguments. Sorry. I'm just pulling up. One moment, Your Honor.

THE COURT: Have we lost you, Mr. Elsberg?

MR. ELSBERG: No. I'm here. I was just going through lots of different sets of notes, and I think I've found the right one.

Okay. So Your Honor, I'll start by addressing the six defendants who are arguing that service was improper because of foreign law limitations. And, Your Honor, those defendants are LGT, LLB, VP Bank, Centrum, Arden and Private-Space. And for now I'm putting aside Cleary's motion about HSBC because that one mainly focuses on something different which is the proper party issue. And their arguments are different from the other defendants.

First I should note specifically with respect to Arden, that, Your Honor, I do -- I appreciate that there's a

preference to decide things on the merits. So I will address all the defendants' merits arguments. But before that, I have to quickly point out that I believe that at the April 21, 2021 conference, Arden did not preserve the right to make this motion, and so they could be deemed to have consented to service, as Your Honor suggested at pages 63 to 64 of the transcript, which is docket 3089. So I've noted that.

But, Your Honor, I'll go on and I'll address the merits with respect to all of the defendants now except for HSBC. So, Your Honor, all six of the defendants have been in regular contact with U.S. counsel who has actively participated in this adversary proceedings. They don’t dispute that.

So the contact test that was set forth in Judge Bernstein's February 22, '21 order which is docket 3076 has been satisfied. In fact, Your Honor, number one, all six stipulated that they retained counsel in these adversary proceedings in late 2010 or by spring 2011 at the latest. Those are in their stipulations.

And number two, all stipulated that counsel has continuously represented them in these proceedings since then. Again, that's in their stipulation. Number three, Your Honor, all six stipulated that counsel has been in contact with them about the proceedings, including advising

the defendants and reporting on developments in the proceedings. So there's no question that they satisfied the test.

Now instead of contesting that the contact test, the contact test is satisfied that Judge Bernstein laid out, Arden and Private-Space point out that their counsel did not enter a formal appearance, a formal appearance until January of 2017. That's at their -- Arden's reply at six to seven, Private-Space's reply at eight, dockets 3815 and 2819.

But their argument about the timing of the appearance, Your Honor, that argument doesn't get them anywhere because the timing of counsel's appearance does not change what matters under Fairfield III because the timing of their appearance doesn't change that the contact test is satisfied.

The fact that they entered an appearance when they did just reflects the fact that the case was stayed for about five years between October '11 and July 2016. That's when Judge Bernstein lifted the stay to allow for the filing of amended complaints. That's docket 418, and his oral lift-stay order is docket 906.

So what happened here is they had counsel monitoring, watching, advising them, in regular contact with them. And then what they did is they decided to appear in January 2017, which they admit in paragraph three of their

stipulation, the Arden and Private-Space. So Arden and Private-Space's argument based on the timing of the appearance of counsel doesn't get it anywhere. It's beside the point to the contact test, which is what matters.

Your Honor, five of the six defendants make another argument -- or sorry, five of the six defendants do not argue that they've been prejudiced in any way from any non-compliance with foreign law on service. And this makes sense because, like HSBC Suisse, the representative defendant in Fairfield, these defendants have been represented by U.S. counsel since late 2010 or spring of 2011 at the latest.

The sixth defendant, Arden, asserts that it has been prejudiced by the liquidators' noncompliance with foreign law on service. But Your Honor, if you look at their papers, they don’t say what that prejudice could possibly be, given that, like HSBC Suisse, the representative defendant, Arden has been represented by U.S. counsel since May of 2011. And they admit that, Arden does, in their reply at page eight. That's docket 3815.

Now Arden asserts that somehow it would be prejudiced because it ceased operations in 2005 and it returned all of its assets to its investors. But, Your Honor, that was Arden's choice. Arden's choice to cease operations five years before, five years before this

litigation even began has nothing to do with any prejudice that could be attributed to service. So Arden's prejudice argument fails, and it should be rejected.

Now the six defendants advance a number of other arguments that also simply do not work. The four Liechtenstein defendants, VP Bank, Centrum, LGT Bank and LLB, those four defendants argue that the liquidators should not have asked this Court to construe our opposition brief as a request for alternative service. They say instead we should be required to file a separate motion seeking alternative service.

But here's the key, Your Honor. The four liquidators -- the four defendants don’t give any reason why the liquidators or this Court, Your Honor, should waste their time and resources, excuse me, on another set of motion papers. Your Honor, there was absolutely no secret here. Everybody knew based on what happened in open court that this round of briefing was going to be devoted to our request for alternative service on the law firms. And everyone knew it because at the April 21 conference, Your Honor was very clear that this Court wanted briefing on law firm service. That's at docket 3809, at page 37.

And on top of that, Your Honor, Your Honor directed the defendants to file the opening briefs. So in light of that direction, there was no need, and it would not

have made any sense for the liquidators to then barrel ahead and file its own separate motion on the identical issue that the defendants had just been instructed to brief. So the four defendants did go ahead and file their brief, as Your Honor instructed.

And as Your Honor instructed, their briefs included their arguments against our request for law firm service just like the other defendants did. And that means there's zero prejudice here. They've had a full and fair opportunity to brief their arguments in not only an opening but also in a reply brief. So there's no reason to waste time on another separate motion. The problem with that --

THE COURT: Let me interrupt -- let me interrupt you one moment --

MR. ELSBERG: Yeah.

THE COURT: -- because you said the four defendants. Name those again for me. I want to have them in my mind clearly.

MR. ELSBERG: Sure. So the four Liechtenstein defendants who make the argument about a separate motion, Your Honor, are VP Bank --

THE COURT: Okay.

MR. ELSBERG: -- Centrum, LGT Bank and LLT.

THE COURT: Okay. Wait a minute. Say those again. Centrum -- Centrum -- I just did two --

MR. ELSBERG: The four --

THE COURT: Who's Verwaltungs? Is that the one you're talking about?

MR. ELSBERG: Yes. I think that's VP Bank. That's --

THE COURT: I know, because he changed the name on me. But I needed to refer to what the actual litigation was. Okay. And now Arden International is a different argument. You're talking about the four Liechtenstein, and Arden is Morocco.

MR. ELSBERG: Correct, Your Honor.

THE COURT: Okay. Thank you. I just wanted to clarify.

MR. ELSBERG: Yes, Your Honor. And yes, just to confirm, Verwaltungs-und Privat-Bank AG is -- I'm referring to it as VP Bank.

THE COURT: Okay.

MR. ELSBERG: And just to recap, Your Honor, the four defendants that said we should have made a separate motion rather than request in our opposition brief are, number one, VP Bank, number two, Centrum, number three, LGT Bank and, number four, LLB.

THE COURT: Thank you. Okay. I have those in my mind.

MR. ELSBERG: Thank you, Your Honor. So they say

that we should have wasted time and we should have done the separate motion, even though everybody knew exactly what was going to happen on this motion and they put their arguments about law service in their brief, their opening and their reply brief. So it's just -- I don't know why they would ask to put in more paper except for delay.

On top of all that, Your Honor, in Fairfield III, Judge Bernstein treated our opposition brief as a request for alternative service. And so it was very reasonable for the liquidators and the defendants here to expect that the same was going to happen this time around. So Your Honor should reject the Liechtenstein defendants' arguments, the four defendants, that they were supposedly just shocked to find out that we were requesting alternative service on this motion.

But Your Honor, before I move off this point, I do want to make something very clear, which is, Your Honor, I do fully appreciate that there are situations where it would make complete sense for a court to say you're making a request for motion for the first time in your opposition brief? Forget it. I'm not going to let you do that. But, Your Honor, I think this just isn't one of those situations given the context that led up to it.

So Your Honor, now I'll switch to another category of arguments that the six defendants make. They all make

arguments, Your Honor, concerning diligence. So I'll start with Arden's argument that the liquidators supposedly were not diligent because the liquidators attempted mail service on Arden at an incorrect address in New York rather than the correct address in BVI.

But, Your Honor, the liquidators were diligent. They prepared and served their complaint based on the limited books and records that were available to them at the time. They relied on fund records, and it was reasonable for them to rely on the fund records which reflected Arden's contact information.

Now Arden says that the liquidators were required to consult different sources to ascertain a different email address. But Your Honor, they don't cite any authority that requires doing so in order for prior attempts at service to be deemed reasonable. And particularly in the circumstances here, where you had liquidators, an insolvent entity, where getting records was very difficult.

They were not held by the liquidators. They were often held by vendors who were located outside of the BVI. So they did what was reasonable or one reasonable way to do it, which the records showed, and they were supposed to show who the correct entities were and their correct address. So the diligence argument about the wrong address should be rejected.

Your Honor, there's another diligence argument that the six defendants make. And this is the argument that the liquidators should have attempted to effect foreign service earlier. That's what Arden and Private-Space say. Or should have requested alternative service sooner. That's what the four Liechtenstein defendants say.

Arden says that the liquidators should have attempted service, foreign service, after Arden's January 2017 motion to dismiss supposedly put the liquidators on notice that the New York address was incorrect. The other five defendants say that the liquidators should have attempted foreign service or requested alternative service. And they say we should have done this after Fairfield I held that the form selection clause authorizing mail service is inapplicable here or right after Fairfield III was decided.

But there's a big problem with their argument, Your Honor. The settled orders that implemented Fairfield I and Fairfield II, they were issued on April 15 of 2019. And those orders identified very specifically issues that were to be briefed in the future. They were to be briefed in the future on motions to dismiss that were to be filed by the defendants.

And one of the issues that was expressly reserved with these motion to dismiss briefs was that the defendants would file briefs on whether service had been properly

effected. And you can see that in the relevant settled orders. That's 10-3630, docket 1955, at pages 11 to 12, 10-3635, docket 1957, at 11 to 12, and 10-3636, docket 1958, at 12. So that was an issue, the service issue. It had been agreed future briefing by the defendants was how that was going to be brought up.

Your Honor, it would have been a complete waste of time and waste of the estate's limited resources to move for alternative service or to try to effect service under foreign law at a time when the liquidators did not know which of those defendants, dozens and dozens of defendants were actually going to contest service in the future when the time came for the defendants to file their motions to dismiss pursuant to those settled orders.

And, Your Honor, the efficiency and the commonsense approach has been borne out by the way things actually played out. Once Fairfield III came out which ruled on law firm service with respect to the representative defendant, it resolves the service issue with respect to the vast majority of the defendants. They resisted at first. But after resisting, the vast majority of defendants entered into stipulations that obviated the need to reattempt service.

So it was entirely reasonable for the liquidators to act exactly as they did and to now ask for alternative

service as to those very few defendants who ended up actually challenging the service. And Judge Bernstein ruled that it was reasonable for the liquidators to attempt mail service in accordance with the subscription agreement.

Judge Bernstein also held, I'm paraphrasing here, that the liquidators' decision to litigate the issue of service after Fairfield I rather than proceed with the costly and time-consuming process of service under The Hague Convention did not signify a lack of due diligence. That's Fairfield III, 2020 WL 7345988, at *page 15.

So Your Honor, the bottom line is that it makes a lot more sense than what the defendants say the liquidators should have done, which is to waste resources. So Your Honor, the defendants' diligence argument based on supposed delay and attention to reserve or to ask for alternative service should be rejected.

So I'll move to another argument that is made by Arden and Private-Space. This is another form of diligence argument and it also does not work. Arden and Private-Space point out that about a decade ago, when the liquidators attempted to serve Arden and PS, the liquidators did not also serve U.S. counsel. What they say is that under Fairfield III, you had to do both, and that the failure to also serve U.S. counsel, in addition to attempting to serve the entity, means that the liquidators did not act

diligently.

But Your Honor, that is simply not what Fairfield III says or implies. In Fairfield III, Judge Bernstein considered whether an attempt to timely serve by mail in accordance with the procedures set forth in the long-form agreement was sufficient to demonstrate due diligence. And he held that making such an attempt was in fact sufficient to demonstrate due diligence. That's at 2020 WL 7345988, at 15.

It also happens to be true after he said that making the attempt is sufficient to demonstrate due diligence, he also noted that the liquidators had also attempted service on HSBC by serving their counsel by mail. But Judge Bernstein did not suggest, he didn't imply that such an effort to serve counsel by mail was necessary to establish reasonableness or diligence. Instead what he held, and I'm quoting, is "The liquidators exercised due diligence. They attempted service in a timely manner consistent with the subscription agreement." And that's at page 15 of the Westlaw cite.

So, Your Honor, Arden and Private-Space's diligence argument based on not having served counsel in addition to the entity about a decade ago should be rejected.

Now I'll get to another one of the diligence

arguments, and this is advanced by all six defendants, Your Honor. And this is the argument that the liquidators didn't possess a subscription agreement when original service was made. So specifically, Your Honor, the six defendants say that back in late 2010 when the liquidators served the Liechtenstein defendants and in 2011 when the liquidators served Arden and in 2012 when the liquidators served Private Space, the liquidators did not possess the long-form contracts authorizing mail service for LLB, VP Bank, Centrum, Arden and Private-Space.

And they say the liquidators did not possess long-form agreements for LGT except with respect to one of the funds, the Sigma fund. And all six of the defendants argue that the lack of possession of the long-form agreement supposedly demonstrates a failure to exercise reasonable diligence. But, Your Honor, that argument also doesn't work.

In Fairfield III, Judge Bernstein considered whether attempting to timely serve by mail in accordance with the long-form procedures was sufficient to demonstrate due diligence. And as I mentioned a minute ago, he held that it was sufficient to follow the procedures in the long form. And none of the defendants, none of the dispute that the liquidators did in fact attempt to serve by mail in 2010, 2011 and 2012 in exactly the manner that Judge

Bernstein found sufficient to show diligence.

Also, Your Honor, four out of the six, namely LGT, VP Bank, Centrum and Private-Space, those four admit that there are in fact long-form subscription agreements. Now it's true that some of those, some of those the liquidators obtained after service. But there's no question that there are long-form subscription agreements that they are party to.

Now the fifth defendant, LLB, put in briefings that it does not deny that it was party to a long-form agreement. It does not say that it was a party. But their brief does not deny that they were a party to a long-form agreement. And LLB also does not dispute that the liquidators possessed a short-form agreement for Sentry and Sigma. Those short-form agreements support the conclusion that the corresponding long-form agreements were in place for LLB because the fund's practice after 2003 consistently was to use these standardized long-form and short-form agreements.

The sixth defendant, Your Honor, Arden, does not dispute that it received redemption payments after 2003 when the funds had the practice of consistently using the long-form agreements with the form selection clause. And that's exactly what the liquidators very reasonably believed to be the case at the time they served LGT back in 2010. And

here's why. In determining that mail service was authorized on all of the defendants, including these six defendants, the liquidators reasonably relied on their understanding that after 2003, this was the consistent practice.

The consistent practice of all the funds was to make redemption payments pursuant to subscription agreements that contained language allowing mail service. That I don't think is disputed, that this was their consistent practice. And that's in the fifth declaration at paragraph seven which is docket 3806.

And as explained, Your Honor, in the Chris declaration in paragraphs three and seven, the liquidators were in a tough spot back then when they were trying to do original service. It was not easy. They had very limited access, Your Honor, to fund documents. And this is because the fund records were very often kept by third-party vendors. And most of those vendors, Your Honor, were located outside of the BVI. In fact, we're still battling. The liquidators are still battling to try to get records from various sources.

So back when the Madoff scheme collapsed and the liquidators had to try to get their hands around this and start serving complaints, what they did is very simply, with incomplete information that was outside of their control, they relied on the funds' undisputed tactics to use the

long-form agreements after 2003. It was a very practical and reasonable approach.

And, Your Honor, I would submit that the defendants' argument that the liquidators could have exercised reasonable diligence only if they physically possessed a subscription agreement for each defendant at the time of service in 2010 is just -- it's not realistic. It's just not responsive to the actual circumstances of what should be reasonable in this in this particular litigation. So the Court should reject the argument based on possession of long-form agreements.

There's another argument about subscription agreement that I'll address now and this is the argument that Private-Space makes. The argument that they make is that the liquidators could not have relied on subscription agreement to attempt mail service on them because Private-Space itself, Private-Space itself did not sign any such agreement.

But that argument is very weak because they concede that long-form agreements were in fact signed by Private-Space's custodian, HSBC SFL. You can see that in Private-Space's reply brief at page six. That's docket 3816. They admit it. They were signed by their custodian. And that's critical, Your Honor, because paragraph 26 of the long-form agreement for Private-Space, docket 3809-13, says

two very important things. One, the custodian has authority to bind the beneficial shareholder and, number two, the subscription agreements are binding on the beneficial shareholder. That's docket 3809-13, paragraph 27.

So the liquidators were obviously reasonable in relying on paragraph 27 and attempting mail service on beneficial shareholders like Private-Space. The fact that they didn't with their own pen sign it is irrelevant.

Now we'll address, Your Honor, another argument that Private-Space uniquely makes. None of the other defendants makes this argument and this argument also fails. What Private-Space argues is that a showing of actual notice standing alone, standing alone is insufficient to defeat a Rule 12(b)(5) motion to dismiss. And what they do, Your Honor -- and this is really a diversionary tactic -- is they cite a litany of cases finding that actual notice alone is not dispositive. But that's a strawman, Your Honor, because the liquidators are not arguing that actual notice in isolation warrants alternative service.

The alternative service inquiry, Your Honor, is very flexible and it allows for consideration of the facts and circumstances of the particular case. And here there's not just actual notice. But here the plaintiffs are the liquidators of insolvent funds. There was an attempt to timely serve by mail, an attempt made in reasonable reliance

on a contractual agreement, the long-form agreement. The defendants had very early notice of this case and, as we know from what I said earlier, they stipulated. They stipulated. They passed the contact test that Judge Bernstein set out. And with this group of factors, Your Honor, there is simply no benefit to jumping through hoops at this point to accomplish service 11 years into the litigation. It's just looking to waste time.

And Your Honor doesn't have to worry that if you -- if you go the liquidators' way on this, that somehow you're going to be opening up the floodgates and it's just going to become too easy. Everyone is going to be able to come in and say, oh, there was actual notice. And so I can serve.

The constellation of facts that we have here that I just went through is not likely to present itself in another case. And so there's no floodgate issue here.

On top of that, Your Honor, Judge Bernstein already found in Fairfield III that actual notice showed that there's no prejudice to defendants from alternative service. He found that actual notice could weigh against requiring an insolvent party to take on the costs and delay of The Hague Convention. And that's Fairfield III, 2020 WL 7345988, at *page 13 and 15. And that's also docket 3062. So, Your Honor, Private-Space's argument based on actual

notice should be rejected.

I'll move now, Your Honor, to address another argument that five of the defendants make. The five defendants are LGT, LLB, VP Bank, Centrum and Arden. This is an argument that gets them nowhere. Specifically, what they argue, Your Honor, is that the liquidators should have served in accordance with foreign law, so under The Hague Convention for Arden and under Liechtenstein law for the four Liechtenstein defendants. And they say that the liquidators should have done that supposedly because viewed in isolation from the other defendants, service in those matters wouldn't be very expensive or time-consuming.

But again, Your Honor, the defendants are being unrealistic. They're just kind of closing their eyes to the realities of this case where there's a liquidator dealing not with just one or two defendants, but with dozens and dozens.

Your Honor, Judge Bernstein already found that the issue of cost in the adversary proceedings is, in his words, "particularly compelling." And he found the cost issue particularly compelling because of the funds' insolvency and its duty to conserve estate resources so that the stakeholders can get paid. And Judge Bernstein accepted our affidavit showing that it will cost $272,441 to serve all 123 Swiss defendants in accordance with The Hague

Convention. That's an average, Your Honor, of $2,214 per defendant. That's in Fairfield III at *page 13.

Here our affidavit shows that it would cost approximately $49,000 to serve the four Liechtenstein defendants, which is an average of about $12,250 per day. That's a lot more than what it would -- than what Judge Bernstein already found to be too much. And the same goes for the other defendants. The amount that it would cost is generally higher than the per defendant cost that was before Judge Bernstein.

But on top of that, even putting aside if it would -- if it would cost less, I think one of the defendants say -- maybe a Morocco defendants says it would only cost about $1,000 to do this.

THE COURT: I thought he said five. But I could be corrected.

MR. ELSBERG: But let's assume it's $5,000, it's $1,000. I would even say it's 50 cents. By the way, I think it's Arden that ay have said $1,000.

THE COURT: Okay.

MR. ELSBERG: Whatever the number $1,000, $5,000, it would take -- according to the Liechtenstein defendants, it would take two months to serve in Liechtenstein. Arden says it would take four months to serve in the BVI. The liquidators say in both cases it would take longer.

But Your Honor, even if they're right about the number of months, a delay of months at this stage would be prejudicial. Discovery is starting and we're looking to complete briefing on the remaining motion to dismiss issues. And a delay of months would put these defendants on a completely different timetable than other defendants, including the dozens of other defendants in 03635 and 3636 who have stipulated to be bound by Fairfield III's service decision.

It just makes no sense, no sense to cause delay and put them on a different track, particularly since requiring the liquidators to undertake these costs now would serve absolutely no purpose, given that the liquidators already served by mail in a reasonable reliance on subscription agreements and the defendants have had notice of this action for over a decade. They've been in regular contact. The contact test is satisfied. So Your Honor should reject their argument about the cost and time to serve.

Then we get into another floodgates argument. The Liechtenstein defendants argue that service on U.S. counsel is almost always going to be cheaper than international service. But again, as I mentioned earlier, this -- the constellation of factors that are present in this case are not likely to be present in another case, including the

liquidators of an insolvent estate, the number of defendants, the fact that they've known about the case very early and have had counsel. There's just no reason to do it again.

So now I'll move to another argument that the four Liechtenstein defendants make that really doesn't hold any water. And this is their argument about comity. What they say is that Fairfield III somehow doesn't apply here because Fairfield III involved The Hague Convention and didn't address, they say, the issue of comity with respect to countries like Liechtenstein.

But the problem for the four defendants here is they can't hide behind foreign law and policy given the rulings that have already happened here, Your Honor. As Your Honor already indicated, the issue here on this motion is whether service on U.S. counsel is warranted based on a specific defendant's contacts with U.S. counsel. And in Fairfield III, Judge Bernstein held that service on U.S. counsel is appropriate. And here's the key, Your Honor. It's appropriate -- service on U.S. counsel is appropriate regardless, regardless of foreign law limitations. And the reason is service on U.S. counsel is not on foreign soil. That's Fairfield III, 2020 WL 7345988, at *page 12.

And here's another critical point, Your Honor. The Liechtenstein defendants give no good reason why

Liechtenstein criminal law should apply extraterritorially here in the United States to bar a form of service that occurs where, here in the territorial jurisdiction of the United States and is permitted under the laws of the United States. So their argument should fail for that reason alone.

But on top of that, I need to address an argument they make that I think is a little off-base. They argue that Judge Bernstein supposedly didn't really consider comity. And they say he didn't consider it why? Because there was only one paragraph, one paragraph in HSBC's -- HSBC Suisse's brief that address comity. But that is not an entirely complete statement.

The reality is, Your Honor, the very paragraph in the HSBC Suisse's brief that they point to relied on and cited to the declaration of Professor NicholasJeanDon. That's docket 2903, at 36. That's the brief which cites to the professor's declaration. The declaration is docket 2905, and there are seven pages to look at which span paragraphs 10 through 22.

And in those 13 paragraphs spanning seven pages, the professor focuses right on -- he's laser focused on comity. So for example, in those seven pages, he argued that allowing service on Swiss soil would be a "severe breach and violation" of Switzerland's "sovereignty" and its

"public policy" and its "core values" and "the very core of Swiss legal order." Again that's docket 2905, paragraphs 10 to 22. So there wasn't just one paragraph.

Judge Bernstein was presented with a well-developed comity argument, and he held that it was not any obstacle to serving a U.S. lawyer on U.S. soil, regardless of the fact, Your Honor, that the U.S. lawyer was going to need to transmit the papers to a client located on foreign soil. And again that's exactly what is allowed under U.S. law applicable to territory in the U.S. jurisdiction.

So the same reason that Judge Bernstein applied applies with equal force to the Liechtenstein defendants here, and so Your Honor should reject their argument.

Now I'll move to another argument. This is one that's made by Arden. Arden argues that the liquidators supposedly flunk the good cause standard. Now to begin with, the good cause standard is simply inapplicable. The good cause standard comes from the text of FRCP 4(m), like mother. But Rule 4(m), like mother, is not applicable to requests for service on foreign defendants. Instead Rule 4(f) which is titled "Serving an Individual in a Foreign Country" is the rule under which the liquidators are seeking alternative service and have attempted service abroad.

And again, there's simply no good cause standard in Rule 4(f) and that alone is a reason to reject Arden's

good cause argument.

But in any event, Your Honor, if the Rule 4(m) good cause standard hypothetically did apply, it's still satisfied here. The liquidators' reasonable efforts and diligence far outweigh any prejudice to Arden. As Judge Bernstein wrote in Fairfield III, the good cause standard is a comparable analysis to that required under the flexible due diligence standard. That's at 2020 WL 7345988 at *13, note 21.

And the liquidators have been very diligent in attempting to effect service. They've done their best. I described it earlier, while being hampered by the need to try to decipher limited fund records and to try to get these records from other sources. And it's important to note, Your Honor, that these circumstances, the documents, it's literally outside the liquidators' control. They've done the best that they can.

In any event, Your Honor, even if the good cause standard did apply and even if we didn't satisfy it, a discretionary extension would be appropriate.

Under Rule 4(m), like mother, the Court can extent time even without good cause. And here a discretionary extension of cause is warranted because Arden had actual notice of the claims from the get-go. They have identified zero prejudice, and because of the extraordinary

circumstances of this litigation where there are dozens and dozens of defendants, liquidators with limited resources and at a very substantial information disadvantage.

So Your Honor, that is the argument that I have with respect to all of the six defendants except for HSBC. I don't know if Your Honor wants to hear from HSBC on this motion or not. I can --

THE COURT: Because HSBC does not have a representative in court.

MR. ELSBERG: Correct, Your Honor.

THE COURT: Very good. Are you complete with your arguments?

MR. ELSBERG: Except for addressing Cleary's motion, which is not on behalf of any entity, yes.

THE COURT: Go ahead and argue that then.

MR. ELSBERG: Okay. So Your Honor, first of all, Cleary's motion, which refers to HSBC, but they say they don't represent HSBC, that motion should be denied because they're seeking dismissal for what they say is a fake entity that they don't represent.

And at the July 28, '21 conference, the recent conference, Your Honor, my interpretation was that you stated pretty clearly and forcefully that counsel cannot seek dismissal on behalf of entities that counsel asserts are fake. That's at pages 96 to 99 of the transcript, which

is docket 971.

And as I recall it, Your Honor, counsel for certain entities that do exist told Your Honor that he should be allowed to make arguments on behalf of a fake entity that does not exist, and he said that he should be allowed to do so because he does represent other entities that have an interest in avoiding some alleged prejudice that he said could result if the fake entity is dismissed or is not dismissed from the case. That's at transcript 98, lines 12 to 24.

And my recollection is that Your Honor rejected that argument and said there's not going to be any motion to dismiss granted based on insufficient service with respect to any fake entities. And that's at transcript 98, lines 12 to 24 once again.

I believe what's happening now is Cleary Gottlieb is trying to do the exact thing that -- at least my interpretation was they're trying to do what Your Honor forbade by saying that they're appearing on behalf of not the named defendant, but on behalf of other entities, whether it's other HSBC entities --

THE COURT: Mr. Elsberg, I'm going to cut you off because I think you're trying to interpret something I said. And I will interpret that myself to Cleary.

MR. ELSBERG: Yes, Your Honor.

THE COURT: And I will be clearer than I was before.

MR. ELSBERG: Yes, Your Honor. And that's why I was saying it's just my interpretation. I'm not trying to say that --

THE COURT: That's fine. That's fine.

MR. ELSBERG: So anyway, my interpretation obviously is not the one that controls here. so anyway, to me, they appear to be doing something similar to what happened last time and was prohibited. They also say that they have independent standing because they were served with discovery requests. But the cases that they cite are cases where amicus briefs were submitted. The cases didn't allow the third party to file motions, which is what has happened here.

So I would suggest that the motions to dismiss based on service should be denied for the same reason, at least as I understood, Your Honor articulated the last time around. But anyway, Your Honor, there's another reason that Cleary's motion should be denied, denied without prejudice to give the parties some time, and this is what I'll explain now.

Cleary's motion is -- and it goes to what I think is a sensible way for everyone to work this out. Cleary's motion is premature because it's outside the scope of the

briefing that this Court ordered. Cleary's motion primarily --

THE COURT: Excuse me. you're talking about -- you're talking about the very narrow issue of the HSBC?

MR. ELSBERG: Yes. I'm talking about HSBC.

THE COURT: Okay.

MR. ELSBERG: Right now I'm talking only about Cleary's brief which refers to HSBC which they say is not a legal entity, but rather a brand name.

THE COURT: Right. Okay.

MR. ELSBERG: So their motion primarily addresses the proper party issue. And this is obvious. You can just look at the preliminary statement, the first few paragraphs at the table of contents. Their lead argument, point one, argues that the main HSBC does not identify a legal entity capable of being sued as a party. Point two of their brief argues that Cleary doesn't know the identity of the proper party.

But here's the thing, Your Honor. The parties agreed, and Judge Bernstein so ordered that the proper party issue is separate from the service issue. And that's in Judge Bernstein's February 26, 2021 so ordered stipulation which is docket 519. And what that doe is it has a list of issues that will briefed and future motion to be dismissed and the service item is listed separately.

It's defined as whether the Court should dismiss claims for failure to properly effect service of process. And then the proper party issue is listed separately and defined as whether any of the claims must be dismissed because the defendant is not a proper party to be sued on the asserted claims. And that list, which has been separate, is in the whereas clause on page 12 and in paragraph 2.1 on page 15.

So my only point there is that the parties and Judge Bernstein had identified distinct issues and service was distinct from proper party. And I understand Your Honor, and again, just my interpretation, I understood Your Honor at the April 21 conference to direct the present motion should be directed to the service issue and more specifically on the issue of whether law firm service satisfied the contact test that Judge Bernstein set forth in his February 22, '21 order which is docket 3076.

And I have in mind some statements you made when I think you said that you'd want to hear about the law firm and that Judge Bernstein had been clear that the proper thing to brief is law firm service. And those are at page 37 of the transcript, docket 3809-1.

But again, you know, Your Honor, I'm not trying to say that I heard you perfectly or that you issued any ruling. it's just my interpretation --

THE COURT: Hold on. Your argument is actually clearing some things up for me too. So thank you.

MR. ELSBERG: Okay. So what I'm -- I'm making a fairly modest point here which is that --

THE COURT: Yeah. I hear you. I hear you.

MR. ELSBERG: -- which is that it's premature for Cleary to be advancing a proper party argument, which is the main thrust of their briefing. And so a reasonable thing to do would be to deny their premature motion now without -- without prejudice and then in the future they'll have the chance to make any appropriate proper party arguments in the future round of briefing, if one is even needed after the fact record has been more fully developed.

And doing it that way, Your Honor, would really be practical and efficient. I'm basically saying it may be required by prior orders. But even more than that, even more than that, what I'm saying is it's just the right, good, efficient thing to do because if it's dismissed without prejudice --

THE COURT: Right.

MR. ELSBERG: -- it's going to give the parties time to determine who is the right party, and it could completely moot any need for further motion practice on it. And I can't promise Your Honor. But what I can say is I do believe that there's a pretty good chance that the parties

are going to end up agreeing on who is the proper party because --

THE COURT: Okay.

MR. ELSBERG: -- because we should be able to figure out the correct recipient of the redemption. And even if we can't figure it out, at least the record will be better developed. And just to give you where we are now and why I think we're very close to figuring it out is after we got information from Cleary because of the subpoena, we made lots of phone calls and emails and we've been working diligently. And we've made good progress because Cleary has now told the liquidators that HSBC Bank USA NA, which I'll refer to as HBUS, does have records concerning the at-issue redemptions.

THE COURT: Okay.

MR. ELSBERG: So that's great. We made progress.

THE COURT: All right.

MR. ELSBERG: And then through the subpoena, when we subpoenaed HBUS, they said that they do have an account. They do have an account. But they say it's an account they hold, but they don’t own the account. And they said instead the at-issue transfers, the redemptions were put into an account held at HBUS that belongs to Citco.

So we then went to Citco's counsel, Paul Weiss, and we said, hey guys, HBUS says you're the one who received

the redemption. They're just holding it in your account. Citco's counsel, Paul Weiss, then pointed the finger back at HBUS and said, no, no, HBUS is actually the beneficiary of the at-issue redemption.

THE COURT: Okay.

MR. ELSBERG: So they're going like --

THE COURT: You --

MR. ELSBERG: And I just think -- I'll finish up. I just think that if we had a little more time to talk to Paul Weiss and Cleary, we're going to nail this down which is why I think dismissing without prejudice and allowing the parties to try to work it out before the proper party motion, which is really the motion where this should have been done anyway, is the sensible way to go.

THE COURT: Very good. And Mr. Nagless (ph) is on the Zoom call, and I'm sure he would want to chime in with what you have to say. So I don’t need to have any more argument on that one. Now I know I'm going to give you rebuttal. But I need to take a quick break. We're going to take a ten-minute break, and I'll be right back.

(Off the record.)

THE COURT: Very good. Is everyone back on the phone, back on? Mr. --

MR. LAMBERT: We're on, Your Honor.

THE COURT: Very good. Mr. Munno, you seem to be

eager.

MR. MUNNO: I am eager.

THE COURT: Okay.

MR. MUNNO: Thank you, Your Honor. So let me start. There are several points. The first point that Mr. Elsberg raised regarding that we argue that there was improper service under foreign law, that is not the argument Arden has made. That's a sleight of hand. Others may have made that argument, not Arden. And this is why.

What the plaintiffs have said all along until they filed their opposition in July of this year was that service was proper on Arden International Capital, Ltd. because it is a U.S. corporation and because supposedly there was a subscription agreement that said that you could serve by mail. That's the argument they made. And what we have said in response to that argument is, no, Arden International Capital, Ltd. is not a U.S. corporation and, no, the subscription agreement does not provide for service by mail.

We attached the subscription agreement in our motion to dismiss in January 2017. It's attached to Monique Adams' declaration as exhibit one and it's ECF 237. That's the argument we made. That's the argument, not that there was improper service under foreign law.

What that told them in 2017 was that they were wrong about some supposed nonexistent subscription agreement

with a clause saying you could serve by mail and that they were wrong in thinking that somehow Arden International Capital, Ltd. was a U.S. corporation, and we attached documents showing that it was not a U.S. corporation. They had all that evidence. We gave them evidence. And since that time, January of 2017 --

THE COURT: Excuse me. You filed it in 2017, and you represented them at that time?

MR. MUNNO: That's correct.

THE COURT: Okay.

MR. MUNNO: That's correct, which brings me to the second point, which is that what they say in their opposition papers is that AIC "has actively litigated for a decade through capable counsel." That's in their opposition brief at 13. They also say that AIC "participated through U.S. counsel in this action since at least 2011." Well, those statements are not correct. They are not correct. What we said in our --

THE COURT: I can't resist. I must ask, about competent counsel or timeframe?

MR. MUNNO: Touché. Counsel is pretty competent.

THE COURT: Okay.

MR. MUNNO: Service is not right. So what we said in our stipulation was that we have monitored the docket activity and developments and from time to time reported

about the status of the litigation. We didn't actively participate. We first started to participate in 2017 solely to address service of process and personal jurisdiction. And those are the only things we've done, and we were very clear in our papers. We said we're making a limited appearance solely, solely for service and jurisdiction.

So there hasn't been active litigation. They don't meet the contact test as regards Arden International Capital, Ltd. and its counsel.

They also say that, well, we had limited books and records. But they don't attach any of those limited books and records that supposedly put them to the -- allowed them to believe that somehow Arden International Capital was a U.S. corporation or that it would have been proper to send by mail to an address at an office building where they never have been. They don't -- they don't attach that. They just make this general statement. But they don't attach any evidence that supports their supposed belief as regards Arden International Capital, Ltd.

They also say that there was some consistent practice that led them to believe that somehow or another there may have been some subscription agreement, even though we attached in 2017 the subscription agreement we entered into in 1993. And we obviously closed down the fund in 1995. So it's hard to understand how there would have been

any so-called long-form subscription agreement or indeed any subsequent purchases of interest in the fund at that time.

They also say that it's not disputed that they used reasonable efforts. Well, we certainly disagree with that. And they try to suggest that, well, Rule 4(m) doesn't apply -- 4(f). But they weren't trying to serve Arden International Capital under that rule. They're saying that it's a U.S. corporation, and we can serve you by mail because the subscription agreement said so. Both of those things are false. They knew it was false. They were given evidence that it was false. And of four years-plus, they've done nothing.

Now they say that we say that, well, it would only cost you $1,000 and take up four months. Well, we don’t say that. That's what they said. We didn't say that. They said it. What we said was, okay, well if that's so, then why didn't you do it for the past four years. So what we were pointing -- we were pointing that out.

We pointed out in our reply brief at page eight, we said that, unlike Fairfield III, plaintiffs represent that it will cost approximately $1,000 and take four months at the most to complete service. That's what they say in their opposition brief at 12, citing Mr. Molton's declaration of July 26th at paragraph 16 and exhibit 10.

Now so we're not the ones that said that. They

said that. We point that out to Your Honor simply to say, well, that's not a reasonable excuse. The point -- and they haven't met the reasonable diligence standard. They did nothing, absolutely nothing to effect service, knowing full well, at least since January 2017, that Arden International Capital, Ltd. is not a U.S. corporation and did not have a subscription agreement allowing for service by mail. They've done nothing. And that is inexcusable, and that's why this motion should be granted.

THE COURT: Thank you. Mr. Morris?

MR. MORRIS: Yes. Thank you, Your Honor. The first thing I wanted to point out was that Fairfield III does not apply here, despite the quotations that the liquidators brought from the judge's order. And I thought I should focus on that. It's docket 3076, which was Judge Bernstein's implementing order on Fairfield III.

He is clear that it applies "equally to all Swiss defendants" and that it authorizes the liquidators to serve process on the other Swiss defendants by mailing process to the U.S. counsel. And he is very clear that he was not ruling on the non-Swiss defendants. And so the aspersions that are being cast I think are not appropriate based on Judge Bernstein's order.

The second point I'd like to make about cost, the liquidator did not respond in their argument to our point

that the costs are entirely -- of translation are entirely self-inflicted by the fact of their choices of they made on how to frame the case. And also there was -- this is one of the examples of how their failure to make a motion is prejudicial.

There was no discovery on their estimate because it came in seven days before our reply papers were due. And there was no change to examine them, their process server on the time estimates as well. The other point on cost is there's an irony here that the cost of translation is far outweighed by the cost of these service motions. This would have been -- and the liquidators' oppositions to them.

The liquidator had under its control whether we're having this fight by simply serving under the letters rogatory in Liechtenstein. This is not the kind of case in which there's a country that is refusing service, as there are countries that have that relationship with the United States. So the cost here is a red herring argument because the costs here are being created by the liquidator.

On the question of motion, whether a motion is required, I just would refer the Court to the DC Circuit case we cited in our reply brief, Freedom Watch, and I think it's 766 F.3d 74, which addresses this issue and requires a formal motion.

Let me talk though more substantively on why

service on counsel is not appropriate. And there's really two issues. Is it generally appropriate on counsel when the foreign country at issue has reasonable procedures, and two, is it appropriate here.

Generally, where the home country has reasonable procedures, comity requires that those procedures be followed. It's how the United States maintains good relations with other countries and expects the same results when our companies are sued abroad. And that of course would not apply if the other country were uncooperative. But that's not the case here.

Service on counsel discourages foreign entities from retaining U.S. counsel, discourages them from consulting with U.S. counsel and discourages them from cooperating with U.S. litigation because the result of cooperating is, in the liquidators' view, you lose your right to have service.

The procedures followed here resulted in dismissal of many cases which would not have -- which would not have occurred had there not been a cooperation with the foreign counsel. And the -- establishing a penalty basically for a foreign company that does the right thing and hires U.S. counsel if there's U.S. litigation, that they cannot rely on their home country service process is not good policy and it's not fair.

The liquidators' argument that this is not service in a foreign country is -- well, is fallacious. The purpose of sending service to U.S. counsel is for them to convey it to the foreign country. And it may be that under U.S. law, service is complete on delivery to the U.S. lawyer. But the whole purpose of that delivery is for the U.S. lawyer to convey it to the foreign country. And so it's -- that federal circuit case that I mentioned before addresses that point as well.

We quote it on page 17 of our reply brief, that the -- everybody knows that the purpose of delivery of the summons and complaint to the U.S. counsel is going to be for it to be delivered by U.S. counsel to the foreign country. So it's a little disingenuous to say the foreign country's rules are not impacted at all.

And that points out the difficult position that service on U.S. counsel puts the U.S. lawyers. They're being asked to do something that their client and their client's government thinks is not appropriate. And it puts the client in a hard position because now they're going to be -- they would be participating in a lawsuit for which they have not been properly served in their country's view. And it puts the lawyer in a very difficult position because they're being asked to cooperate in an act that is not proper under their client's -- the law applicable to their

client.

And all of this in a case where there is, and there has been a perfectly reasonable solution that was known to the liquidators since 2012 when we told them about the letters rogatory in a formal objection in a statement from Dr. Hoch and was known to them in Fairfield I and in Fairfield III. And there's just no good reason for them not to have acted to avoid putting the Court in this position and avoid putting counsel in this position and avoid putting the liquidators -- the defendants in this position.

And finally the liquidators also -- the result of this -- of service on counsel may well be a judgment, if the case goes in their favor, that's going to be unenforceable in Liechtenstein for failure of service. And that's where VP Bank is. And they're not here.

And it would be a colossal waste of efforts to go through this process only to have this result. And I understand that's the liquidators' problem. But when we're weighing good faith efforts and reasonableness of choices an efficiency, I would urge the Court to take that into account as well.

THE COURT: Thank you.

MR. MORRIS: And I thank you for your patience.

THE COURT: Very good. Mr. Lambert? You're on mute. You're on mute.

MR. LAMBERT: Sorry. Yeah. I just want --

THE COURT: That's fine. We all do it.

MR. LAMBERT: Yeah. We've all done it. Right. I just want to address one point that Mr. Elsberg raised. It goes to our argument about the lack of diligence that the liquidators showed when they made that one abortive attempt to serve my client back in 2012. And that is the argument that I made, that Private-Space did not itself ever sign a subscription agreement, long-form or short-form. Any subscription agreement that was signed on its behalf was signed by its custodian, HSBC Securities Services (Luxembourg).

Mr. Elsberg pointed out that my argument is a fallacious one because there's a provision in the subscription agreements whereby the subscriber is representing that he's authorized to act on behalf of the beneficial owner and that the beneficial owner is bound by the agreement. We're not contesting that by HSBC signing this agreement, they bound us to this agreement. We subscribed to the shares in the funds. There's no question about that. And we did it by having our subscribers sign the subscription agreement.

But the subscription agreement provision which deals with service of process by mail says, and it's in paragraph 19 of this long-form subscription agreement, it

reads, and I'm quoting, "Subscriber consents to the service of process out of any New York court in any proceeding by the mailing of copies thereof by certified or registered mail, return-receipt requested, addressed to subscriber at the address of subscriber then appearing on the fund's records."

I mean, the Monaco address to which they sent service, it's never been alleged that that's an address of a subscriber, and I submit that there's no provision in this agreement which authorizes mail service on a beneficiary, even if the beneficiary is bound by this agreement.

And so I think that the -- so the answer to -- the point I'm making here is that they weren't entitled to rely on a consent to service provision in a subscription agreement because Private-Space never signed on. You have to recognize, Your Honor, that these are the fund's forms of documents, and under the well-known canon of construction, any ambiguity in these agreements gets resolved against the drafter.

And if they wanted to have these provisions allow for service on a beneficial owner, it should have so specified, and it doesn't. Thank you, Your Honor. I appreciate your patience in listening to us.

THE COURT: Thank you. Mr. Hauser?

MR. HAUSER: Yes. Thank you, Your Honor. Just

very briefly, first, we join a hundred percent in Mr. Morris' arguments representing the other two Liechtenstein defendants. Just one quick point. Counsel for the liquidators said that we don't dispute this supposed consistent practice about having people sign the long-form agreements.

We do dispute that. They've got conclusory -- we dispute that they have submitted sufficient evidence to show that there was any such consistent practice. They have a conclusory, we would suggest speculative statement in one of their declarations. There's no indication that that declaration was made from personal firsthand knowledge. They've submitted no documentary evidence to back this up.

We do dispute that there is evidence in front of the Court sufficient to establish that there was a consistent practice of having people sign the long-form subscription agreements.

THE COURT: Thank you. And Mr. Bamberger, your --

MR. BAMBERGER: Your Honor, just very, very briefly. I'm mindful of Your Honor's construction with respect to our role here. I think Mr. Elsberg is correct that the narrow question Your Honor asked to be brief was service on counsel. I think you've already addressed that with respect to the entity named as HSBC that we don't represent.

The only point I'd make is Mr. Elsberg spent a lot of time talking about how this issue should properly be resolved in a future round of briefing on, quote -- what he referred to as the proper party issue. And the problem with that is if we haven't been served -- if a client of mine hasn't been served and we can't appear, we're not going to be able to argue that issue at that time either. This isn't as if they served one entity and we're arguing a different entity should be the defendant.

So with that, and a reservation of rights, I don’t have anything else to add, Your Honor.

THE COURT: Very good. I'm going to take about a 20-minute break. So you all -- we'll just -- we'll keep the Zoom up. So we'll leave it right there. And I'll deal with everything you discussed. Thank you.

(Off the record.)

THE COURT: Very good. I'm ready to rule, unless someone has anything else they wish to add.

Today the Court is deciding the service issue, and this issue stems from Judge Bernstein's December the 14th, 2020 decision in which he determined that a foreign corporation may be served pursuant to Federal Rule of Civil Procedure 4(f), and it states, unless federal law provides otherwise, an individual may be served at a place not within any judicial district of the United States by any

internationally agreed means of service that is reasonably calculated to give notice, such as those authorized by The Hague Service Convention or, and this is three, 4(f)(3), by any means not prohibited by international agreement as the Court orders.

Judge Bernstein allowed service by mail on U.S. counsel and held that such service effectuates service, excuse me, under 4(f) despite the fact that it does not meet The Hague Convention standards for service or, in this case, the Liechtenstein or I think Morocco is still under Hague, but not Liechtenstein -- Liechtenstein. Service under this rule cannot be retroactive. So Judge Bernstein granted the liquidators' request to serve U.S. counsel by mail and ordered it done within 60 days.

In making this determination, Judge Bernstein considered the following factors: adequate communication between the counsel and party to be served, and you can see Fairfield III, HSBC Suisse had undoubtedly been a regular contact with Cleary Gottlieb and had actively participated in the HSBC actions since at least September 2010. I'm going back to that order. And then two, whether plaintiff reasonably attempted service. Yes, defendants were served by mail as contemplated in the subscription agreements, which turned out to be improper a la Fairfield I. Cost and delays associated with re-serving on counsel versus under

The Hague Convention.

Pursuant to an order entered on February the 26th, 2021, Judge Bernstein stated the decision instructed the parties to settle orders in each affected adversary proceeding collectively, the affected adversary proceedings on notice or submit consensual orders. And I know there was not agreement. And submitted separate proposed orders to the Court.

The principal difference between the proposed orders concerns whether the Court's decision should also authorized the liquidators to serve process on other Swiss defendants by mailing their process to U.S. counsel.

In the end, the answer depends, as it did in the HSBC Swiss, on whether U.S. counsel had been in regular contact with their Swiss client and had actively participated in the particular adversary proceeding effort after it was commenced.

Consequently, while certain determinations bind all Swiss defendants, specifically the Court's authority to authorize service on U.S. counsel under Federal Rule of Civil Procedure 4(f)(3), the propriety of ordering such service on other Swiss defendants depends on the facts of that case and that is the order in Fairfield Sentry Limited (In Liquidation), et al. v. Theodoor GGC Amsterdam, et al., 10-3496 jointly consolidated at ECF 3076.

Before the Court are 11 motion to dismiss by seven defendants in three adversarial proceedings. The remainder of the defendants have stipulated to proper service, and that's pending the appeal of Judge Bernstein's decision.

In front of me is 10-3630, Private-Space, Ltd. That's at docket 149150, and one defendant has settled. Is that correct? Yes. 10-3635, Verwaltungs-und Privat-Bank, docket 568569, Centrum Bank AG, 571572, LGT Bank in Liechtenstein, 353575, 577, 579, Liechtenstein LB Reinvest, 579, 580, HSBC. And then in 10-3636, Arden International Capital, at 627, Verwaltungs-und Privat-Bank, 628, 629, Centrum Bank AG, 631, 632, GTL Bank in Liechtenstein, 633, 634, and shorthand LLB, Liechtensteinische LB Reinvest AMS Liechtensteinische Landesbank AG.

The first one I want to deal with is Cleary's motion not on behalf of HSBC, for want of a better term, in 10-3635. HSBC brief filed by Cleary Gottlieb and signed by Mr. Bamberger states there is an entity named as a defendant that is identified only as HSBC and the undersigned counsel does not appear to know the identity of that entity. The firm argues that it has not been retained by and does not represent any entity called HSBC. It cannot accept service on behalf of such non-entity and it would not know how to advise such a non-entity that it had been served in its place.

Cleary Gottlieb asked the Court to dismiss the complaint against HSBC despite the fact that it does not represent HSBC and does not know if such an entity exists or whether it's been properly served. The Court has previously cautioned counsel that bankruptcy Rule 90-11(b)(1) prohibits the filing of a pleading for an improper purpose such as delay, harassment or causing expense, even if the filing relates to a claim that it is otherwise colorable. Bankruptcy Rule 90-11(b)(2)(4) requires a party's attorney to perform a reasonable preliminary investigation of the facts and the applicable law before filing a paper in federal court

The legal papers and attorney files in any case must be grounded in both a non-frivolous legal theory and a well-founded factual contention and/or denials that at a minimum have a reasonable possibility of having evidentiary support after further investigation and discovery. That's In re Telecom Court, 319 BR 857, Northern District of Illinois, 2004, affirmed American Telecom Corp. v. Siemen Information Commerce Networks, 404 C 8053 2005 Westlaw 5705113 Northern District of Illinois.

Good faith alone is not enough to comply with the frivolous clauses of Bankruptcy Rule 90-11. 90-11 imposes an affirmative obligation upon counsel to conduct a reasonable inquiry into both the law and facts before

advancing a particular position in the court. In re Martin, 350 BR 812, Northern District of Indiana.

The liquidators mailed a summons to HSBC at its registered address at global headquarters at HSBC Group at 8 Canadian Square, Canary Wharf, London, United Kingdom. The Court need not consider whether this is improper service as HSBC has failed to properly appear in this court. A corporation or other entity may appear in a federal court only through a licensed counsel. In re Rowland and California Men's Colony, 506 US 194, U.S. Supreme Court 1993., Jones v. Niagara Frontier Transport Authority, 722 F.2d 20, Second Circuit, 1983.

A corporation involved in a legal proceeding must be represented by counsel.

As HSBC is an artificial entity and is not represented by a counsel in this action, the motion to dismiss -- and I will do it on behalf of the liquidators' request, without prejudice -- by Cleary in 10-3636 must be -- must be denied.

The remaining movants fit into Judge Bernstein's Fairfield III decision and the law of the case is going to be followed. The Liechtenstein defendants, VP Bank, 10-3635 and 10-3636, VP Bank objects to liquidators' relying on having mailed a summons and complaint by international registered mail to VP Bank, AG Liechtenstein and to Citco

Global Custody NV in The Netherlands and in Ireland to VP Bank's U.S. counsel who has not agreed to accept service and who has not already indicated that VP Bank AG was appearing especially without waiver of its obligation to service or personal jurisdiction.

VP Bank also argues that the Liechtenstein law of October the 22nd, 2008 on the service of official documents, and that's the Liechtenstein law on service, provides that to serve foreign official documents in Liechtenstein, a foreign authority or court from where the documents originate must be made applicable for legal assistance to the Liechtenstein district court and that service of official documents in Liechtenstein must be carried out by court-appointed officials or court-appointed service providers.

Centrum, 10-3635, 10-3636. Liquidators rely on having mailed the summons and complaint by international registered mail to Centrum in Liechtenstein and to Citco Global Custody NV in The Netherlands and in Ireland and by U.S. mail to Centrum's U.S. counsel, who had not agreed to accept service and who has consistently indicated that Centrum was appearing specifically without waiver of its objections to service or personal service.

Centrum also argues that the service by mail in Liechtenstein is prohibited.

LGT Bank, 10-3635, 10-3636, liquidators rely on having mailed the summons and complaint by international registered mail to LGT Liechtenstein and to Citco Global Custody NV in The Netherlands and in Ireland and by U.S. mail to LGT U.S. counsel who has not agreed to accept service and who has consistently indicated that Centrum was appearing specifically without waiver of its objection to service or personal jurisdiction.

LGT Bank argues that service by mail in Liechtenstein is prohibited.

Liechtensteinische LB Reinvest AMS, Landesbank AG, 10-365, 10-366. Defendant Liechtensteinische Landesbank Aktiengesellschaft sued here erroneously as Liechtenstein LBB -- LB Reinvest AMS moves to dismiss the complaint. Liquidators rely on having mailed the summons and complaint by international registered mail to Landesbank in Liechtenstein and to Citco Global Custody LB in The Netherlands and in Ireland, service by mail is prohibited in Liechtenstein as a defense.

Private-Space, 10-3630 and this is the case where the custodian had -- was authorized to sign. Private-Space argues that Morocco prohibits service by mail and as such the liquidator should not be permitted to cure service by mailing process to Private-Space's U.S. counsel. It argues that unlike Cleary and HSBC, Private-Space has no U.S.-based

counsel who was never served with papers and the only service it was via registered international mail on July the 31st, 2012 to Private-Space, Ltd., 7 Rue de Gabin, MC 98000 Morocco.

AIC, 10-3636, plaintiff purports to serve AIC by mailing a copy of the summons and then operative complaint to an office building in New York, New York where AIC did not, does not and never had an office. AIC was incorporated under the laws of the British Virgin Islands in 1993. AIC is a former offshore fund of hedge funds -- offshore fund of hedge funds that ceased operations in 2005 and returned all of its assets to the investor. It argues that even if mail service was proper, it was never served by mail at the correct address.

On December the 14th, 2020, this Court issued a well-reasoned -- this Court, with Judge Bernstein presiding, issued a well-reasoned decision on service of process in these redeemer actions. And I know it was geared to the Swiss. I am following Judge Bernstein's law in the case for all the other cases. That's Fairfield Sentry Limited v. Theodoor GGC Amsterdam, 220 Westlaw 7345988.

Reconsidering was denied, and then the order of February the 23rd, 2021, the decision states, "A foreign corporation may be served abroad in any manner prescribed by Federal Rule of Civil Procedure 4(f) for serving an

individual except personal delivery under (f)(2)(c)(i)," and that's filed at Federal Rule of Civil Procedure 4(h)(2) Rule 4(f) in turn states in pertinent part, serving an induvial in a foreign country, unless federal law provides otherwise, an individual may be served at a place not within any judicial district of the United States, one, by any internationally agreed means of service that is reasonably calculated to give notice such as those authorized by The Hague Service Convention, by any means not prohibited by any international agreement as the court orders. Federal Rule of Civil Procedure 4(f).

Courts have repeatedly recognized that there is no hierarchy among the subsections of Rule 4(f). Washington State Investment Board v. Odebrecht SA, 1:17-cv-08118 (2018), Westlaw 2653877. That's the Southern District of New York, September 21, 2018. According In re GLG Life Tech Corp Securities Litigation, 287 F.R.D. 262, Southern District of New York, 212, Advanced Aerofoil Techs AG v. Todaro Number 11, cv-9505 ALC 2012 Westlaw 299959, Southern District of New York, January 31, 2012.

Hence court-directed service under Rule F -- 4(f)(3) is favored as service under Rule 4(f)(1). GLG Life Tech, 287 F.R.D., quoting Real Prox Inc. v. Rio International Interlink, 285 F.3d 1007 9th Circuit 2002. A plaintiff -- and this is a quote, "A plaintiff is not

required to attempt service through the other provisions of AF before the court may order service pursuant to AF 3." SEC v. Anticivic, 05 CV 699, KMW 2009 Westlaw 36139, Southern District of New York, February the 13th, 2009.

Also see Madu, Edozie & Madu PC v. Socketworks Ltd, Nigeria, 265 F.R.D. 106, Southern District of New York, 2010.

Service of process under Rule 453 is neither a last resort nor extraordinary relief.

An alternative method of service under Rule 4(f)(3) so long as it is prohibited by international agreement and comports with constitutional notions of due process. Odebrecht 2018 Westlaw 6253877. Acordstream SICAV v. Wayne, 989 F. Supp. 2d, Southern District at 264, S.D.N.Y., 2013.

The decision to approve an alternate method of service is committed to the court's sound discretion. SEC v. China Ne Petroleum Holding, 27 F. Supp. 3d 379, S.D.N.Y. 2014. In re Et South African Aprahei litigation, 643 F. Supp. 2d 423, 2009, S.D.N.Y. (ph).

In exercising this discretion, the Court in this district routinely require, and quote, "a showing that the plaintiff has reasonably attempted to effectuate service on the defendant and a showing that the circumstances are such that the court's intervention nis necessary." Odebrecht,

2018 Westlaw 6253877.

"But nothing in Rule 4(f) itself or controlling case law suggests that a court must always require a litigant to first exhaust the potential for service under The Hague Convention before granting an order permitting alternative service under Rule 4(f)(3)." GLG Life Tech, 287 F.R.D., at 266.

The Court also considered whether allowing service on U.S. counsel was permissible and decided affirmatively so long as the movant shows adequate communication between the counsel and the party to be served. And I quote, "The Court agrees with Odebrecht and other cases ruling that a service to a foreign defendant via a domestic conduit is permissible under Rule 4(f)(3)."

Here there can be no doubt that adequate communication exists between the counsel who filed these motion to dismiss and their clients. New York Rules of Professional Conduct require that a lawyer promptly inform the client of any decisions or circumstances with respect to which the client's informed decision is defined as 1.0J as required by these rules.

Any information required by the court rule or other law to be communicated to a client and material development in the matter including settlement or plea offers. Reasonable consultation with the client about the

means in which the client's objective are being accomplished, keep the client reasonably informed about the status of the matter, promptly comply with the client's reasonable request for information and consult with the client about relevant information on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by these rules or other law. A lawyer shall explain a manner to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Further though under the Rules of Professional Responsibility, if the client relationship should break down prior to the service being effectuated, the New York Rules of Professional Conduct require that upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to avoid foreseeable prejudice to the right of the client including delivering to the client all papers and property to which the client is entitled and complying with the applicable laws and rules. New York Code of Professional Responsibility 1.16.

That includes forwarding papers that the client has ordered to be accepted on behalf of the client.

The defendants argue that these cases have been pending over ten years and try to say that service should have been corrected during the timeframe. The Court

addressed that argument in his decisions and found that, and I quote, "The liquidators exercised due diligence," and service process, "in a timely manner consistent with the subscription agreements." Fairfield III, 2020 Westlaw 7345988, at 15.

Additionally, the Court held that the defendants did not suffer prejudice as a result of the passage of time. Again, I quote, "Despite the service issue, they have been actively litigating numerous issues in this court since 2010 including the dismissal of all the liquidators' claims which culminated in this decision and these threshold issues had to be decided before the issue could be advanced."

Since the Court's decision in 2020, the only delays in these redeemer actions were those created by this Court for needing to get up to speed in this Chapter 15 as well as the BLMIS Cipa case. In fact, Judge Bernstein issued a decision reconsidering his December of 2020 decision on February the 23rd, 2021, only five days prior to this case being reassigned to me.

The Court also determined that service of foreign countries would be cost-prohibited for these insolvent cases. Again that's in the order. The Court also stated, or his opinion, the Court also stated that where the defendants, and I quote, "had actual notice of the redeemer action, had actively litigated for a decade through capable

counsel," and then quote again, "the purpose of the service requirement has already been accomplished."

This Court sees no reason to abandon the law of the case in these adversary proceedings. In re Motor Liquidating Company, 590 BR, 39 S.D.N.Y. 2018, law of the case doctrine applies across adversary proceedings in the same bankruptcy case. It's affirmed at 943 F.3d 112, Second Circuit (2019).

For the reasons stated herein, the motion to dismiss by Cleary is denied. The motion to dismiss by all other plaintiffs is all other denied and service on the defendants' U.S. counsel who files these motions is permitted. The liquidators must serve these counsel by First Class mail within 60 days of the date of this memorandum.

The liquidators, if you want to enforce a judgment, should also consider whether any particular defendant, either one of the movants or any of the non-movants, should be served under international law as the Court does not intend to permit additional service of process in the future.

On February the 22nd, 2021 -- now end of decision, submit an order, Mr. Elsberg.

Additional issues remaining to be briefed. On February the 22nd, Judge Bernstein signed a so-ordered stip

in the redeemer action for the following issues to be decided: the constructive trust pleadings issue and the receipt issue which is -- should be coming after the personal jurisdiction issue which is what I want briefed next. And you all can talk about that, about what timeframe we want on that.

Brought up today though was the proper party issue. If a proper party is not in the courtroom, then the default should enter against that party. Defendants are free to stipulations -- to stipulations of the proper party if they do not wish a default judgment entered. There are no fake defendants. A corporation or other artificial entity may appear in the federal court only through a incensed counsel. I've said that before.

An attorney cannot represent a client that the attorney argues does not exist. Again, Code of Professional Responsibility, 1.1. An organizational client is a legal entity. It cannot act except through its officers, directors, employers, members, shareholders and other constituents.

That does not mean however that a constituent of an organizational client are the clients of the lawyer. The client may not disclose to such constituents information relating to the representation except for disclosure explicitly or impliedly authorized by an organizational

chart in order to carry out the representation or as otherwise permitted under Rule 1.6. authority and responsibility provided in this rule are concurrent with the authority and responsibility provided in other rules and a lawyer for an organization continues to have duties of communication, confidentiality and conflict of interest.

Since an attorney-client relationship is essentially contractual, ordinary rules governing contract formation determine whether such a relationship has been created. Jordan v. Lipsig, Sullivan, Mollen & Liapakis, 689 F. Supp. 192, SDNY (1988).

Formality is not an essential element in the employment of an attorney and since the original arrangements for representations are often informal, it is not necessary to look at the words -- it is necessary, excuse me, it is necessary to look at the words and the actions of the parties. Hashemi v. Shack, 609 F. Supp. 391, S.D.N.Y. (1984).

Disclosure of the identity of a client and the fee arrangement are not privileged communications. In re Shargel, 742 F.2d 61 (1984). And I quote, "We have consistently held that client identity and fee information are, absent special circumstances, not privileged." Second Circuit.

While the attorney-client privilege historically

erodes at the same time as privilege against self-incrimination, it was early established that privileges had distinct policies and that the point of honor, the attorney's reluctance to incriminate his client was not a valid reason to invoke the attorney-client privilege. And that's from that case.

Under Rule 3.3, a lawyer is ethically required to disclose, unless privileged or irrelevant, the identities of the client the lawyer represents and the person who employed the lawyers.

Now here comes my question which was brought up today. Are there any proper party issues that do not involve "fake entities"? Mr. Elsberg, you brought it up. We can't hear you.

MR. ELSBERG: Can you hear me now?

THE COURT: Yes, perfectly. Can you hear us?

MR. ELSBERG: Hello?

THE COURT: Can you hear us?

MR. ELSBERG: Yes. Can you hear me?

THE COURT: Yes. We can hear you now. We can hear you.

MR. ELSBERG: Oh, the answer to your question is no, Your Honor.

THE COURT: Okay. All right.

MR. FROOT: Your Honor?

THE COURT: Yes, sir. Mr. Froot?

MR. FROOT: Excuse me. For the Zurich defendants, there is one defendant that is improperly named, I think both the liquidators and Zurich know what entity is being referred to. So it's more of a clerical matter of fixing the name, and we're involved in discussions over that proper stipulation right now.

THE COURT: Okay. If you can't come to a conclusion, I'll need a scheduling order to be entered and we will deal with it in the courtroom.

MR. FROOT: Yes, Your Honor.

MR. MORRIS: Your Honor, it's David Morris. As I mentioned in argument, VP Bank has simplified its name and is now known by that name and acquired Centrum, which has merged into VP Bank. So there's no dispute that the entities all exist. They just have a new name.

THE COURT: I'll let you all figure that out.

MR. MORRIS: Thank you, Your Honor.

THE COURT: I'll stay with the old name until we get something done with that.

MR. MORRIS: Thank you.

THE COURT: This Court must strike from the record any pleadings made by a lawyer acting without a client and default should be entered against any artificial entity who is not represented by legitimate counsel. And I've already

gone over this many times.

When you're representing -- and you all have used the term -- a fake client, the Court has to file with the Court the identity of the person paying the fees for the lawyer to appear on a fake entity's behalf and the amount of the fees being paid or shall face a grievance committee investigation.

As to any parties who may need to be switched out but do not actually exist, a scheduling order should be entered, a joint pretrial determined after discovery is complete and eventually a trial date. I'm moving forward with the rest of the defendants.

Now then, at this point, I understand there is an order consolidating the redeemer actions. I want to hear from you if that is viable and should be revoked. It seems that the defendants each have their own arguments on their own case in their docket. Mr. Elsberg, I'll hear from you first. You're on mute again.

MR. ELSBERG: I'm so sorry, Your Honor.

THE COURT: Okay.

MR. ELSBERG: So I think that there are lots of arguments about consolidation that are still outstanding. I don’t know. it might be productive for the parties to confer about it and get back to Your Honor if that's acceptable.

THE COURT: Yes, of course. Of course. And you'll need to have orders on everything that I've just given you. The other thing is personal jurisdiction is the next issue.

MR. ELSBERG: Yes, Your Honor.

THE COURT: And would you please also -- why don't you all confer and let's set up a scheduling order to that or I was going to say how do you suggest we go about setting up a scheduling order on that. But you're going to need a scheduling order. Well, I've given you 60 days to perfect service.

MR. ELSBERG: That's --

THE COURT: And you have to make some decisions on that, and it's got to be quick to get the rest of the service done.

MR. ELSBERG: Yes, Your Honor.

THE COURT: Why don't you - -why don't we -- why don't we still have a -- let's meet again on September 15th just as a checking in day.

MR. ELSBERG: Good idea, Your Honor. The parties have already begun these discussions. So I'm very hopeful that by the time we get to that hearing, we'll have some agreed-upon proposals for Your Honor.

MR. BAMBERGER: Your Honor, can I --

THE COURT: Yom Kippur begins that evening.

MR. ELSBERG: Yes, Your Honor.

MR. BAMBERGER: Yes, Your Honor.

THE COURT: Mr. Bamberger, you were going to say something. I interrupted you.

MR. BAMBERGER: Yeah. A clerical issue, Your Honor. So there are a number of defendants. I understand Your Honor's order that personal jurisdiction will be the next thing to be briefed. I think defendants are eager to get that briefed. And so we'd be happy to do so on an expedited basis. We can talk about the schedule now, or if you'd prefer that we confer --

THE COURT: I'll prefer you all confer.

MR. BAMBERGER: Just --

THE COURT: I think it's pretty obvious you all have been talking.

MR. BAMBERGER: Yeah.

THE COURT: I'm not opposed to anybody -- I prefer people talking on that.

MR. BAMBERGER: Just one point, Your Honor, on which I think we actually need an order from the Court, and that is that there are a number of defendants who -- not a number, a few defendants who will not be raising personal jurisdiction defenses.

The Court's order at our last conference granted the liquidators leave to amend their complaints. And under

the rules, we would have -- those defendants would have a deadline to answer or move. And I think Your Honor is setting a briefing schedule such that those defendants don't need to do that on the deadline -- the 14-day deadline set in the rules. But I don't want there to be any ambiguity about that.

THE COURT: Mr. Elsberg?

MR. ELSBERG: That's fine. As I understand Mr. Bamberger, there are a few defendants that simply don't plan to contest personal jurisdiction. We understand that they do have some motion to dismiss arguments that will be coming up, but not personal jurisdiction arguments.

THE COURT: Okay. All right. If they don't need to answer, then they don't need to answer. So, okay.

MR. BAMBERGER: Thank you, Your Honor.

THE COURT: Anything else? Am I missing anything? I can always --

MR. ELSBERG: Not --

THE COURT: -- tell you I enjoy good lawyers. It's always a joy. So thanks, everybody.

MR. ELSBERG: Thank you, Your Honor.

MR. BAMBERGER: Thank you, Your Honor.

THE COURT: We'll see you all again on September 15th. Ten o'clock, same time. Ten o'clock.

MR. LAMBERT: Thank you, Judge.

THE COURT: Thank you.

MR. ELSBERG: Yes, Your Honor. Thank you. Bye-bye.

THE COURT: Go into chambers, please.

(Whereupon these proceedings were concluded)

I N D E X

RULINGS

C E R T I F I C A T I O N

I, Sonya Ledanski Hyde, certified that the foregoing transcript is a true and accurate record of the proceedings.

Sonya Ledanski Hyde

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